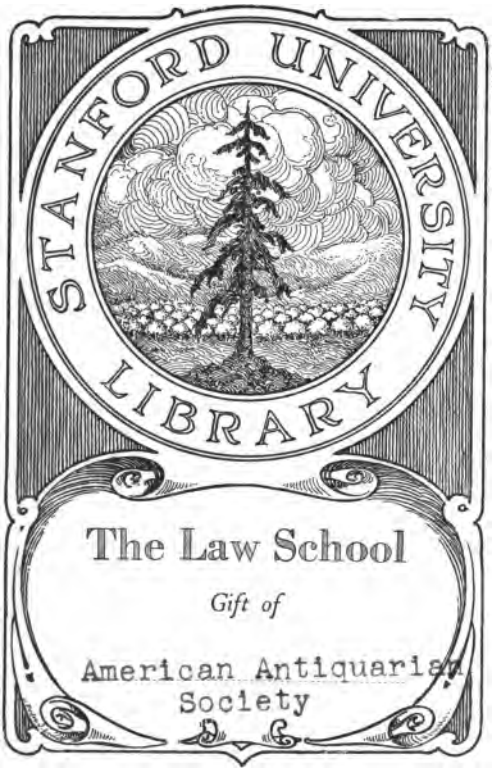
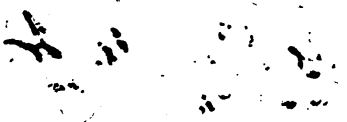

STANFORD UNIVERSITY
LIBRARY
The Law School
Gift of
American Antiquarian
Society

BB
AGH
IGh



Sir Jeffery Gilbert

THE

HISTORY AND PRACTICE

OF

CIVIL ACTIONS,

PARTICULARLY IN THE

COURT of COMMON PLEAS.

Jos. Sewell &c.

BEING

AN HISTORICAL ACCOUNT

OF THE

PARTS AND ORDER OF JUDICIAL PROCEEDINGS, *viz.*

WRITS, APPEARANCES, BAIL,	DECLARATIONS, PLEADINGS, ISSUES,	TRIALS, VERDICTS, JUDGMENTS,	ERROR, AND COSTS;

WITH

The several Changes introduced into these Proceedings and Practice by the several Statutes of Amendments, Jeofails, and Costs:

And containing a general Account of the

Principles of Special-Pleading in all Civil Suits:

WITH AN

INTRODUCTION

ON THE

CONSTITUTION OF *ENGLAND*.

BY THE LATE LORD CHIEF BARON GILBERT.

THE THIRD EDITION,

Carefully corrected from the many Errors in the former Impressions;
With the Addition of many Notes and References.

DUBLIN:

PRINTED BY JAMES MOORE, No. 45, COLLEGE-GREEN.

M.DCC.XCI.

ADVERTISEMENT

TO THE

READER.

THE copy-proprietors of this excellent work having made known their intention of publiſhing a THIRD edition, received intimations from ſeveral gentlemen well acquainted with the writings of the late lord chief baron GILBERT, that the INTRODUCTION which ſtands prefixed to the two preceding editions, was not to be found in ſeveral manuſcripts which they had ſeen of the HISTORY AND PRACTICE OF THE COMMON PLEAS, that from other particulars there was reaſon to conclude it was not written by the learned chief, and therefore, in juſtice to the memory of ſo great a luminary of the law, ought not to be reprinted without previouſly undergoing a critical reviſal and correction.

THE INTRODUCTION.

TO underſtand the conſtitution of *England*, we muſt conſider it under a fourfold period.

Firſt, At the coming of the firſt *Saxons* before they were civilized, which was in clans and troops, and is already deſcribed in the hiſtory of the feuds.

Secondly, Their erection into a firm ſtate and kingdom under *Alfred*.

Thirdly, † The great alteration at the conqueſt.

Fourthly,

† The alteration that took place at the conqueſt reſpected only the *tenure* of military lands, which before this great epoch in the *Engliſh* hiſtory were holden of the *Saxon* and *Daniſh* kings by the reſpective tenants either for years or life, but by our firſt *William* were granted to the reſpective tenants and THEIR ‡ HEIRS *in perpetuum*: but no alteration whatſoever took place, in regard to the court of Common Pleas, for the Conqueror having confirmed the laws of *Edward* the Confeſſor *in omnibus rebus*, (as he ſays § *lex* 63) there was neceſſarily no alteration in the court of Common Pleas.

‡ *Vid. Leges Gulielmi primi artic* 59. " *Statuimus & firmitur præcipimus ut omnes comites et barones & milites, & ſervientes (ſervientes, id eſt, per* magnam *et* parvam *ſerjeantiam) et univerſi liberi homines totius regni noſtri habeant et teneant ſe ſemper in armis et in equis ut decet et opertet, et quod ſint ſemper prompti et*

Fourthly, The preſent ſcheme and eſtabliſhment of the law, begun by *Edward* the firſt.

* Page 2. We ſhall begin with the ſecond, (*viz.*) the erection into a firm ſtate or kingdom under *Alfred*.

The mean † order of government, by which *Alfred* civilized the *Engliſh*, was making the men of ſeveral ‡ clans compurgators of each other, whereby each clan was turned into a decennary: and the manner of doing it was thus:

He took from the people the power of electing their § thanes, and appointed them himſelf; and

---

et bene parati ad ſervicium ſuum integrum nobis explendum & peragendum cum ſemper opus ad fuerit, ſecundum quod nobis debent de feodis et tenementis ſuis de jure facere, et ſicut illis ſtatuimus per commune conſilium totius regni noſtri et illis DEDIMUS *et* CONCESSIMUS *in feodo jure* HEREDITARIO,

§ *Præcipimus ut omnes* habeant *et* teneant *leges* Edwardi *regis* in omnibus rebus.

† This order of government is not of the inſtitution of ALFRED, he has the honour indeed of collecting together the former laws of INA, OFFA, and ETHELBERT into one code, as we learn from his own words "Ic ða Elfred cyning ðæſ togædere gegaderode. ⁊ appitan het, monega ⁊ ðara ðe ure foregengan heold ðon." Thus *Alfred* may in one ſenſe be called the founder of theſe laws, for until his time they were an *unwritten* code, but he expreſly ſays, "that I *Alfred* collected the good laws of our forefathers into one code, and alſo I *wrote them down* appetan het," which is a deciſive fact in the hiſtory of our laws well worth noting.

‡ The word CLANS is not known in our *Saxon* laws; nor were the clans (as this author calls them) *indiſcriminately* compurgators for each other; for only the *three neareſt* decennaries, together with that decennary where the offence was committed, were reſponſible for the damages done by the offender; and theſe four decennaries are what we at this day call the *vicenage*. A decennary conſiſted of ten families, the head of each family being a Borgermon, or a kiboſ-germon, which is ſynonimous to a freeholder at preſent. The head of the decennary was called kpiboþgerheakoð: the word is nearly retained at this day in our head-borough-man: he was the head or capital judge of the decennary, and the whole decennary had cogniſance *de paſcuis pratis, meſſibus, et de litigationibus inter vicinos, et innumerabilibus hujuſmodi decertationibus: ut apparet per leges* Edwardi *ſancti regis* 32.

§ The author by the word *Thane*, would here be underſtood to mean the Eaþboꝛman, or the Hlaꝛkoꝛð, or the gerekan, or the

and according as the people of the same manors cohabited together, he divided them into shires; over

---

the kingerheord of the *Saxons*, but is mistaken, for the Thane was not a title of dignity *per se*, it was an honorary appellation, yet the honour proceeded not from the Thane himself, but on the contrary from the person to whom he chanced to be the upper servant. There were three degrees of Thanes: Thus, if he was the upper-servant of the king, he was called the *king's thane*; if of an earl or of a sheriff, he was then called a thane of the second degree: but if of a head-borough, he was then called a thane of the lowest order. But none of these thanes were annually elected in the full folcmote, as the Earls sheriffs, and head-boroughs were, nor did king *Alfred* (as this author suggests) deprive the people of the election of those last mentioned magistrates and nobles, much less did he appoint them himself: nor can it strictly be said, that he divided the kingdom into shires, he only renovated the old divisions of this kingdom, which the *Romans* had, many centuries before his reign, established, as appears by the 12th of king *Edward*'s laws, "*quod modo vocatur* comitatus, *olim apud Britones temporibus Romanorum in Regno Britanniæ vocabatur consulatus.*"

The author is also mistaken when he mentions the earl's being the proper thanist of the clan, for in the *Saxon* times there was no such magistrate either military or judicial as the Thane, nor were there any clans here as in *Scotland*, nor was the *Brehon* law known here at that period of time, though the injustice and oppression of it was in after-times severely felt in *Ireland*, and very justly complained of as a national grievance.

This author is likewise mistaken, when he says, that the earl and his shire-reeve were to array all the several persons within their respective shires; for it was the proper especial province of the ealdorman or earl to attend the shyre-meeting twice a year, and there officiate as the county-judge in teaching and expounding the *secular* laws, as appears by the 5th of *Edgar*'s laws, "ȝ þæn æȝpen ðæcan ȝe Hoberfnihte ȝe peopulðnihte." Besides, it did not belong to the shire-reeve *ex-officio* to array the several persons within the county; this office properly belonged to the *heretoche*, who was an officer similar in power to the Lord-Lieutenant of the county, and was not appointed by the king, but annually elected in full county-court or folcmote, *vid. leges* Edwardi 35. "*in quolibet comitatu semper fuit unus heretoch per electionem electus ad* conducendum exercitum comitatus *sui et isti ordinabant acies densissimas in præliis et alia constituebant prout docuit, et prout melius eis visum est, ad honorem coronæ, et ad utilitatem regni.*"

Nor was this array usually made after *Michaelmas* and *Lady-day*, for the election of the *heretoch* was annually voted at the *first* county court, which was always holden on the first of *May*, and the arraying of the county militia, *&c.* was made at the *second* county-court, which was annually holden on the first of *October*, *vid. Leg.* Ed. *Statutum est quod per provincias et patrias universas et per singulos comitatus*, populi *omnes et gentes universæ, singulis annis, scilicet in capite kal. Maii debent convenire, et*

over every ſhire was the earl, which was the proper Thaniſt of the clan; for by the *Brehon* law the *caput comitatus* was the eldeſt and moſt worthy, the earl of the county, and his ſhire-reeve were to array all the ſeveral perſons within their reſpective ſhires; and therefore the perambulation was through the county twice every year, in which * the ſhire-reeve made the civil array of all the men in the county; which was uſually done after *Michælmas* and *Lady-day*; and if any † perſon was found that had no compurgators, he was put into priſon till he could obtain ſome decennary to admit him. The earl or ſheriff on theſe law-days was uſed to give in charge the ſeveral articles of the crown-law; and if any perſon was guilty of a breach of any of them, he was delivered up by the compurgators; ſo that the *Saxon* law conſiſted of the ſeveral articles that were given in charge at the ſeveral † torns; and the kings

* Page 3.

---

et ibi, inter alia, eligere in pleno folcmote *heretochios ſuos— aliud autem folcmote debet eſſe, ſcilicet in capite kal. Octob. ad providendum ibi quis erit vicecomes, et qui erunt eorum heretochii, et ad audiendum ibi juſta eorum præcepta conſilio et aſſenſu* procerum, *et* JUDICIO *folkeſmote.*"

† None but freemen were admiſſable into decennaries, and ſuch perſons who were not in any decennary were claſſed amongſt perſons of a *ſervile* condition, which was the only puniſhment, or rather the only diſgrace, they underwent, unleſs indeed they had been found guilty of ſome crime or offence, which was puniſhed according to the nature of the delinquency, as may be ſeen in the ſecond, third, and fourth laws of *Athelſtan*, and in the third of *Ethelfred*, in none of which laws is there the leaſt mention of puniſhment by *impriſonment*.

† There is no ſuch court, nor even any ſuch word as "Torn" in the *Saxon* laws, nor indeed is there any word in the whole law-language ſo little underſtood, or that now requires ſo much correction as this. In order therefore to trace it up to its real original and true meaning, it is neceſſary to obſerve to our readers, that King *John* in one of the articles of the great charter grants "*quod nec aliquis vicecomes vel balivus ſuus faciat* TERMINUM *ſuum per hundredum niſi bis in anno.*" It is here in this article we firſt meet with that nonſenſical phraſe of *ſheriff's* TOURN, ſuppoſed to be conveyed in the word *terminum*. The antiquity of the character in which the *original* charter of king *John* was written occaſioned many

kings at their ſeveral acceſſions publiſhed by ‡ proclamation their ſeveral laws; as appears by *Lambert's*

---

many ignorant copyiſts of it to write *turandi* inſtead of *terminum*; other copyiſts too there were, who though they underſtood the true meaning of the word *terminum*, yet by an abbreviation wrote it *terun:* thus between theſe two models of copying this article of the great charter, the word *terminum* was ſo uſually written or abbreviated into the word *turnum*, that when this great charter came to be confirmed in the ninth year of *Henry* the third, which was only eleven years after it had been firſt obtained from king *John*, the word *turnum* was inſerted not only in the original confirmation itſelf, but in all the copies of this renovated charter. I have been more particular in reſtoring this word to its true and unabbreviated orthography, becauſe (ſays the annotator) I find that Mr. Juſtice *Blackſtone*, in his elaborate edition of the great charter, hath not only omitted the whole article in which the word *terminum* is inſerted by king *John*, but he has alſo in *Henry* the third's confirmation of it copied the word *turnum*, not as an abbreviated, but as an entire, radical word itſelf. If we take the word *turnum* as an abbreviation of *terminum*, as moſt undoubtedly it is, there will not be found either in *John's* great charter or in *Henry* the third's confirmation of it one ſingle technical law-term but what had been in common uſe, in this kingdom, not only at the time thoſe two moſt important grants or declarative *warranties* were promulgated, but for *centuries* before their promulgation. On the other hand, if we are to conſider *turnum* as an unabbreviated, radical word, we muſt then ſuppoſe our anceſtors totally ignorant of the *Latin* technical words then in common uſe in all their law-inſtruments, and that they ſtept out of the road of pure latinity, which the word *terminum* is, merely to introduce a barbarous phraſe, unauthenticated by any preceding *Latin* writers either in this or in any other country, and that too at a time when either the word *iter* or *perambulatio* (both of them then in common uſe) would have been technically claſſical, and fully expreſſive of the meaning they intended to convey. But our own annaliſt *Matthew Paris*, a *Benedictine* friar in the monaſtery at *St. Albans*, who was contemporary with *John* during his whole reign, and who alſo lived to ſee forty-two years of the reign of *Henry* the third, hath put this matter paſt all diſpute. For in the copy of *John's* great charter which this accurate annaliſt hath given us, he writes the word *terminum* at full length. In the firſt printed edition of this author's works, the ſame accuracy hath been happily obſerved, and here lies the difference between the manuſcripts of our antient law *Latin* authors (ſuch as *Glanvil*, *Bracton*, and *Fleta*) and thoſe of our antient *Latin* hiſtorians, namely, that in the former, their words are generally abbreviated, while in the latter, they are as generally written at full length. This difference in the manner of writing one and the ſame word ſufficiently accounts for the blundering adoption of the word *turnum* for *terminum*, which miſtake will ſtill appear more liable to happen, when we call to mind that in our antient court-hand writing

INTRODUCTION.

Lambert's Saxon laws under the reſpective *Saxon* kings.

(Where

---

writing there is very little difference between the form of the ſeveral letters t, u, m, n, e, i, and that the letter "i" is written without any tittle over it. That *terminum*, and not that nonſenſical word "*turnum*," is ſtrict orthography is further and incontrovertibly confirmed by a tranſcript of *Henry* the FIRST's charter, which was the baſis of king *John*'s Magna Charta. This tranſcript is directed to *Sampſon*, biſhop of *Worceſter*, urſon of *Abcot*, and to all the *French* and *Engliſh* barons of *Worceſterſhire*, and runs in the following words: "*Sciatis quod* concedo *et precipio, ut a modo comitatus mei et hundreda in* ILLIS LOCIS *et* EISDEM TERMINIS *ſedeant, ſicut ſederunt in tempore (ſancti) regis Edwardi, et non aliter.*" Beſides, if we had neither this record of our firſt *Henry*, nor *Matthew Paris's* copy of the great charter to aſſiſt us in detecting this error, we might eaſily diſcover it in the word *terminum poſt paſche et iterum poſt factum ſancti Michaelis*, which we literally tranſlate, and even at this day call *Eaſter* and *Michaelmas* term. And as thoſe terms were in thoſe days begun and ended in one day by the ſheriff *per hundredum* (in the *ſingular* number) ſo it was emphatically called the ſheriff's day, agreeable to which denomination we ſtill call an entire term only one day, in law, or one law-day. Judge *Britton*, who was contemporary with this *Henry* the third, in his book of the law of *England* in the French language expreſsly calls it "*jour de viſc*" "*journe de viſc*," and then, giving the reaſon why it is ſo called, adds "*ceo que eſt apelle devaunt le viſc* JOUR DE VISE *eſt appelle veux de frank plegge en court de fraunk home, et en fraunchiſes et à hundres. A* quel jour *le viſcote face jurer* XII. *des plus ſages, et plus leals, et plus ſuffiſaunts de tout le hundred.*" But as there at firſt could be very few copies of this book, it ſeems very probable that the few perſons who were in poſſeſſion of it miſtook the word *iourne de viſiconte* for *tourne de viſconte*, and thus confirmed the egregious blunder that had ariſen before by abbreviating the *Latin* word *terminum* into that of *turnum*, or *tournum* as it has ever ſince been indiſcriminately written. It is on this account, I take it, that it became neceſſary about 200 years afterwards to explain what was meant by that barbarous, unintelligible word "*tournum*" which accordingly was done, in the firſt year of *Edward* the fourth in which ſtatute it is clearly explained to be a LAW-DAY, and thus the word was reſtored to its true and original meaning, and conſequently the true and original orthography of it ought to have been readopted by Mr. Juſtice *Blackſtone* in his edition of *Henry* the third's confirmation of king *John's* magna charta; but I muſt (without offence) beg leave to obſerve, that the confirmation before mentioned, from which he took his copy, is a *ſpurious* one, and ſpurious in every article which either makes an addition to, or diminution of, king *John's* great charter. For *Matthew Paris* expreſsly inſiſts that the charter of King *John* and the confirmation of it (eleven years afterwards) by his ſon *Henry*

the

(Where there were ſeveral clans in one ſhire, the earldom was placed in the perſon who had the greateſt clan in number and riches;) † but if there were other leſſer clans not under the ſame head or confiny, they were divided into § *ſatrapia's*, or hundreds, and the lord of ſuch *ſatrapia* or hundred arrayed his own men, which were therefore

---

the third, were *in* NULLO *diſſimiles*. And the authority of that *Engliſh* hiſtorian, who from his local ſituation as a monaſtic reſident all his life-time ſo near the ſeat of action as the monaſtery of St. *Albans* was, muſt neceſſarily have ſeen both the one and the other, and who, as the moſt accurate as well as celebrated hiſtorian of his *own* time, hath carefully tranſmitted to poſterity, an exact faithful copy of the great charter itſelf, and yet hath not handed down to us one ſingle article of *Henry* the third's confirmation of it, adding, for a very good reaſon of ſuch his ſilence and total omiſſion, that "*charte utrorumque regum in nullo inveniuntur diſſimiles.*" The authority, I ſay, of an hiſtorian, whoſe veracity in the ſimple ſtatement of ſuch facts as came within his immediate knowledge and his own ocular conviction hath hitherto very juſtly ſtood unſhaken and unimpeached, ought not to be weakened by groundleſs ſuggeſtions or improbable conjectures. If ſpurious copies have of late been miſtaken for the authentic copies of the charters, it was no more than what Sir *Edward Coke* had done before, which fatal error, together with his ſuperficial tincture of the *Saxon* laws, led that great lawyer (great, I mean, in the knowledge of mere *ſtatute* law) into many errors, as may be frequently ſeen in his expoſition of (what he calls) the Great Charter, and alſo in his ſummary hiſtories of the ſeveral courts of Parliament, Chancery, King's Bench, Common Pleas, and in particular of his Court of the TOURN (as after *Lambard* and *Kitchen* he writes it) and his Court of the Leet.

‡ Not *all* the *Saxon* kings, for we have only the laws of eleven *Saxon* monarchs, and thoſe of *king Canute* the *Dane*, all which ſeveral laws were not *publiſhed* by proclamation; but, on the contrary, were *promulgated* either in ſome great national ſynod of the clergy, or in the Ireneþuȳꝛꝛe, which was a national council, in contradiſtinction to the FOLCMOTE, which was only a *provincial* parliament.

† So much of this paragraph, which I have encloſed between the parentheſis, hath been refuted in a preceding annotation.

§ There was no ſuch nominal diviſion of dominion or territory as that of a *ſatrapia*, and what gave riſe to any ſuch notion, is the *Latin* tranſlation of the word "eorle" which in the laws of *Athelſtan*, is tranſlated by the word ſatrapa: but the word eorle in *Saxon* ſignified the firſt civil magiſtrate or judge in the county, and it was not his office to array his own or any other men either in the county-court, or hundred court, as I have already obſerved.

fore leets, ‖ and said to be taken-out of the torns; and in this array the articles were given in charge as

‖ True it is, there was in some few provinces such a territorial division, and territorial jurisdiction as by the *Saxon* was called a Leꝺ, but this division always contained the third part of the county or province, and consequently bears no resemblance or affinity to what we call a court-leet at present, nor does *Kitchen*, who has written an express treatise on this court, give us the least idea of its institution, or or its real and true name. Sir *Edward Coke*, who has also written a summary history of this court, advances nothing but inconsistencies, contradictions, and puerile conjectures, having no foundation in historical truth, and his whole comment upon it may truly be said to be an *ignotum per ignotius*: but the true name of this court, if orthographically written, is the court of the lit, that is to say the court of the little (or petty) jury: for lit, in the old *Saxon* language, is a diminutive of the adjective little. The institution of this court, under its present denomination, is immediately subsequent to king *John's* great charter, for the counties, barons and other great-landholders of those times, having compelled their respective villains and slaves, to unusual and unaccustomed task-work, and no persons of servile condition being then deemed worthy to be admitted to take an oath in open court, and being thus deprived of the protection of the law against their respective lords or masters, a new article was devised and inserted in the great charter in their favor, the article is the 23d, in which it is established for ever, that "*nec homo distringatur facere pontes ad riparius, nisi qui ab antiquo et de jure facere debent.*" the reader is here to be informed, that the word "homo" standing without the adjunct of liber, *probus legalior melior*, *legalis* or *capitalis*, always signifies a person of servile condition, which class as in the laws of *Alfred* may be seen comprised "the ꝺeop" and "the Eſne-pihtum." Now these base and servile persons becoming by this great-charter admissable into the hundred court on certain occasions, it drew down a kind of contempt and derision upon the court itself, insomuch that the *majores barones* would not attend at all, and therefore they afterwards obtained an act of Parliament to be excused from their attendance; and the next class of freeholders imitating, in some measure, the *amajores baronos*, would not roll with the lesser freeholders; and thus the court became divided into classes of jurymen, namely the *Grand-jury*, which as *Briton* clearly informs us was composed of twelve persons *des plus sages, et plus lealx, et plus suffisauntz de tont le hundred*: which the jury, whom we now call the petty jury, were sworn (as the same learned author observes) *par decennas et par villes queux leat presentement ferrount as primers* xii *jurours sur les articles dont ils serront charges par eux.*" and here we have the origin or first institution of our petty jury, which jury, as they were now and then obliged to admit villains menial servants, and other persons of base and servile condition amongst them, and that too upon the oath of vile slaves, it turned this

as at the torn. § In boroughs where there were great numbers of men in walled towns, they were arrayed by the conſinies and heads of the clan within the town; and therefore every ward had its proper alderman, who was choſen and not impoſed by the prince.

In every decennary there was a *præpoſitus* or ‖ conſtable choſen in the torn, and reſpective leets, who was head of the decennary during the year; theſe were thoſe that had the ſtaff; and therefore ſometimes called † borſholders, ‡ tithing

this jury into ſuch contempt, that in deriſion it was called the court of the lit, that is to ſay, not the little, but the leſs than little court, which by corruption is called the court of the leet.

§ A borough or burgh as it is written in the *Saxon* language, was the proper appellation of what in *latin* is called *decenna* or *decuria*, and what we in Engliſh, at this day call a decennary which always conſiſted of ten families, each perſon in the decennary being what we now underſtand by the word freeholder, and accordingly in the *Saxon* tongue he was called a fri-borges-mon; if more than one decennary lived in the ſame town, it then generally came to be a walled town, and the chief magiſtrate of ſuch walled town had the title of Ealdopmmane, and had the ſame rule in ſuch walled town as the Eorle had in the county.

‖ The conſtable was not the headman of the decennary, for the tithingman or headboroughman was a *civil* magiſtrate, whereas, on the contrary, the conſtable was a *military* officer, and had always the cuſtody and guard of ſome caſtle or other, and to him, *ex officio*, belonged what the French call *haute moyenne, et baſſe juſtice*: but theſe conſtables or Caſtellains, having groſsly abuſed their judicial authority, there was afterwards an article in king *John's magna charta*, injoining that *nullus conſtabularius teneat placita coronæ*,—it likewiſe explains a paſſage in another article of the ſame charter, where it is eſtabliſhed, that "*nullus conſtabularius diſtringat aliquam militem ad dandam denarios pro* cuſtodia caſtri: and laſtly, it explains another paſſage in the ſame charter in which the king binds himſelf, that he will not make any conſtables but of ſuch perſons *qui ſciant legem regis et eam bene velint obſervare*: for it ſeems theſe conſtables before this charter, governed their caſtles and the ſeveral perſons within their juriſdiction by the laws of the dutchy of *Anjou*, as I have obſerved above, and not *per legem terræ*.

‡ The errors of this paragraph have been pointed out already, and amended, but I muſt obſerve, the *Saxons* had no general court under the denomination of a Witena-gemote, the ſtyle of their general Courts was either mycelne ꝑommunge Hoꝺeꝼ ꝺeopena or ꝺe mycelne ꝼynoꝺ or ꝺe ȝeꝼæꝺꝺyſſe."

† The errors of this paragraph have already been corrected in a preceding annotation.

* Page 12. ing-men, and headborough, as the head of the decennary.

Thoſe in the county at large were choſen in the torn, before the earl or ſheriff, and in the leet before the lord or his ſteward; in the boroughs they were choſen before the aldermen in their proper ward, which was called the ward-mote; and the aldermen did themſelves annually chuſe their head or *præpoſitus*; becauſe being ſeveral in their reſpective wards, it was neceſſary that there ſhould be one head in each townſhip; and therefore there was an annual magiſtrate among the aldermen, who made up one *decenna* in each town, and their *præpoſitus* was the conſtable, or head of ſuch *decenna*; the laws were made at the *witena-gemotes*, which was a general court of the whole kingdom, as the torns were of the counties.

* Page 12. * The torns were the folc-motes, and to them were ſummoned all the decennary of the counties, unleſs in leets, to which they ſummoned the boroughs of the reſpective counties.

To the *witena-gemote* were ſummoned the earls of each county, and the lords of each leet; and likewiſe repreſentatives of the townſhip, who were choſen by the burghers of the town; and they appeared (by the king's writ iſſuing out of his own court) at the † *witena gemote* once a year at the leaſt, and generally twice, (*viz.*) about *Eaſter* and *Michaelmas*.

This Law of the decennary continued ſome time after ‡ *William* the conqueror came over, and

† The witena-gemote, as it is here called, was not holden once a year at leaſt; on the contrary they were only holden when the kings (and not even all of them) aſcended throne.

‡ *William* the conqueror, as appears by his own code of laws, expreſsly confirms the laws of *Edward* the Confeſſor, and conſequently in them this law of the decennary: and this law, though it be not carried into execution at preſent, yet it ſtands unrepealed to this very hour. and happy were it for this kingdom, if this law, which, in the above-mentioned code, is emphatically, and very juſtly called the "*ſumma et maxima ſecuritas regni*," was,

and there is a ſhadow of it till this day; for when the people grew numerous, it was impoſſible to put every man into a decennary; and therefore on the leaſt offence given they made them find ſureties, which by the *Saxon* * law were previouſly found. So where any perſon was charged with a debt, he might purge himſelf by his proper ſureties, and this was the † original of the law-wager.

* Page 13.

Vid. 12. Mod. 569. the hiſtory of it.

The torn perambulated twice every year through each hundred, (unleſs there was a leet, from whence the ‡ ſheriff was excluded) and twelve men were impanelled to inquire of all offences, ſo that the whole inqueſt might not come from one *decenna*; and it ſeems that if any perſon

---

was, inſtead of daily multiplying our penal laws, which we learn by daily and hourly experience hath anſwered no other end but of filling our criminal code, multiplying felons, and depopulating the land by tranſportation of convicts, or by the more unmerciful and inhuman policy of public executions of them here at home, happy I ſay were this decennary law revived, and carried again, with vigour and effect, into execution throughout the whole Britiſh empire.

† The marginal note here referred to does by no means give the reader any thing like a hiſtory of the original of the law-wager for this mode of determining ſuits and actions by battle or duel is not confined to actions of debt, but to any actions in which the plaintiff hath called the defendant a liar, or a traytor. The origin of it was founded upon the true principles of a military government, in which it was deemed more politic, and more for the public good, that a coward ſhould loſe his debt, or other action, than that a man of tried courage, and military dexterity ſhould appeal to any other judge but his own quarter-ſtaff; for that was the weapon the combatants fought with on theſe occaſions. *N. B.* This mode of determining all ſorts of actions of debt without deed, may ſtill be inſiſted upon, except in ſuch caſes where it is takenaway by ſome ſpecial act of parliament; and it is at the option of every defendant (except as above excepted) to be tried, either by his country or by his God: the latter trial is this waging war or wager of law.

‡ The Sheriff could not be excluded from the *leet* or LIT, becauſe it was holden, as *Britton* rightly obſerves, *devant le viſc. en journe de viſc.* If the author of this introduction has any meaning, it is, that the ſheriff's authority in the lit ceaſed, and was inſtantly ſuperſeded by the juſtices in eyre coming into the county.

‡ The trial by ſimple ordeal was for theft, but not for other crimes.

perſon was preſented by the jury of his hundred he was to purge himſelf by † ordeal, in the room of which the petit jury was ſubſtituted after the conqueſt; and if there was favour or affection ſhewn by the ſheriff, or the ſteward, there was an appeal to the king's court; and it appears by the *Mirrour*, that † *Alfred* animadverted very ſeverely on the judges of courts that had been guilty of injuſtice.

* Page 14.

* *The Alteration upon the Conqueſt.*

When the conqueror came in, every perſon found in arms againſt him forfeited his whole eſtate, in which he placed his *Normans*, and compelled all thoſe who were not in arms againſt him, to take out patents of their lands to hold of himſelf: in order to this he made a general ſurvey of the whole kingdom, which was called ‡ *domeſday*; and from hence it is, that we have ſuch an innovation

† By the word judges we muſt not here underſtand the judges of the *king's-bench*, *Common-pleas*, in *eyre*, or of *aſſize*; but the judges here alluded to, were the zenorans, who had judicial authority in county-courts, and hundred-courts, and of theſe judges no leſs than 35 did king *Alfred*, in one year, ſentence to be hanged, beſides degrading or impriſoning ſeven others; for the ſeveral crimes of which *Alfred* found them guilty, *vid. Andrew* Horn's Mirrour in his article of the abuſes of the common law.

‡ William, duke of *Normandy*, on his conqueſt of this kingdom, found the landed property already parcelled out into three diviſions, one thouſand five hundred thri-things or leths, hundreds, wapentacs, and burks were the proper, *unalienable* lands of the crown, about twice the number of lands were, by this ancient diviſion, allotted to the church and churchmen, the churchmen held one third of theſe lands, for the ſupport of themſelves and their reſpective dignities; and, for the expenditure of which, they were accountable to no man; as for the two remaining thirds, the clergy held them in *truſt*, for the ſpecial purpoſes of giving doles or charity to the full amount of one-third, and of expending the other third in building new, or in beautifying, or repairing old churches; as to the third diviſion of property, which compriſed all the lands not otherwiſe appropriated to the crown or the churches, it was allotted to the *ſecular* nobles, which word included every ſecular perſon, who was not of ſervile condition.

The

vation of the law in this period; and whereas the *Saxon* property was either *allodia*, which the *Civilians* call *in ſolido*, and deſcended to all their children and collaterals, and was by them called *Bockland*, and was held by charters; which was originally invented by the clergy in ſecuring lands to their monaſteries; or elſe † *Folcland*, which were eſtates for life at moſt, * and were held by vaſſals from the great lords by certain ſervices, or works; or elſe were earldoms of counties, which were held by the king without ſpecial charter, for the gathering in of his profits, and adminiſtration of juſtice, and were generally for life, unleſs forfeited for miſdemeanor, and often granted to children, where the anceſtor was meritorious.

* Page 15.

The crown-lands were carefully regiſtered in [illegible] books, and therefore they were called Bockland, which is the ſame thing as Bookland. Theſe Bocklands as I ſaid above, were by their original conſtitution, unalienable from the crown. But the early *Saxon* kings, by the help of their lawyers, found out an eaſy method of eluding this inſtitution. For they gave or deviſed certain portions of theſe lands to their own male relations for life, with ſpecific remainders over, and by always reſerving the reverſion to themſelves, and making the grant in the moſt public manner poſſible, and that too by a written tranſcript from the crown-books or regiſter; it was deemed the kings had not departed from, or diveſted themſelves of, any part of their Bocland, becauſe the crown ſtill had an eſtate therein. The laſt will and teſtament of king *Alfrid* is a confirmation that Bocland could only be given or deviſed by a King, and *ſub modo* as I have ſaid before. The domeſday book of the conqueror, was nothing more than a new Bocland, and a new one became abſolutely neceſſary, becauſe the ſeveral denominations and deſcriptions of the crown-lands, underwent a total reformation or alteration, and conſequently new patents became neceſſary.

† Folcland was only a ſubdiviſion of that landed property, which a perſon of free eſtate deviſed either to ſome *ceorl* at an annual rent, or which be apportioned out for the ſupport of his own houſhold, and alſo for that of his *Theowas*, afterwards called villeins, theſe in the *Norman* reigns, and eſpecially in this, the earldoms of counties were always holden by ſpecial grants in writing I have ſeen many of theſe charters, they are very ſhort, and are generally, couched in the following form: "I *William*, ſirnamed the Baſtard, king of *England*, do give and grant the county of *A.* to *B.* and his heirs for ever to be holden of me and my heirs after the ſame manner as it was holden by *D.* his predeceſſor."

First, Charter Land. Second, Allodial. Third, Sheriffwicks. Second, Incorporated to the State.

All these the conqueror made feudal, and to hold of himself hereditarily, generally by knights-service, which had the fruits of wardships, marriage, and relief, that he might keep up the dependance on himself.

Where a township had lands, and subsisted before with a † provost or mayor, as the city of *London* and cinque ports, these lands the conqueror gave to such and their successors, by the tenure of contributing * a reasonable tribute towards the wars.

* Page 16.

He also confirmed to the monasteries, and to the bishops, lands either in *frankalmoigne* or *per baroniam*, according as the charter runs.

From hence it was, that all lands were held mediately or immediately from the king, because every body was obliged to pass patents for their estates; and this the conqueror made to be held by **fealty, that** even the property of their estates **might depend** upon their allegiance to him. This **prevailed** every-where save only in *Kent*, where amongst other customs they had that of *the father to the bough, and the son to the plough*, which first extended to save them from all forfeitures; but afterwards was construed to extend to felony only; and these privileges were allowed to *Kentish* men by the grant of *William* the conqueror.

* Page 17.

Whether * they opposed him and made this an article of their submission, or whether it was an act of grace obtained by *Lanfranc*, archbishop of *Canterbury*, and *Odo* bishop of *Bayeux*, who were settled in *Kent*, is uncertain.

Those that held immediately from the king were called his head tenants or in *Capite*, ‡ as holding

† The title of the chief magistrate of *London* was not that of provost but Portreyekan or port reeve.

‡ These tenants in *capite* were such persons as held the crown-lands, immediately under the king: if they held an escheat, they were not properly tenants in *capite*, because the king himself was not the chief lord of such escheat, he was only lord *per accidens*.

ing from the head of the government, and gave out under-charters to their vaſſals; but ſtill they were under ſubjection to the king; and upon any treaſon committed, the feuds were forfeited to the king, and not to the lords, becauſe they ought not to receive any into their lands, but what were faithful to the king.

In the court above he altered the manner of proceeding: in the *Saxon* times in the *witena-gemote*, all matters both civil and criminal † were then debated, as likewiſe the revenue; yet for civil and criminal matters * they were only a court (in the firſt inſtance) for facts ariſing within the county, where they ſat; but by way of appeal from the injuſtice of other officers they heard cauſes from all counties. But *William* the conqueror only cauſed the ſtates to recognize him, and had not thoſe annual parliaments ‡, fearing that being all *Engliſh* they might prove dangerous; but he eſtabliſhed a conſtant court in his own hall, made up of the officers of his palace, and they tranſacted the buſineſs both criminal and civil, and likewiſe the matters of the revenue; and as they ſat in the hall they were a court criminal, and when up ſtairs a court of revenue; the civil pleas they heard in either court. N. B. Two Courts.

* Page 18.

Theſe courts conſiſted of the *juſticiarius*, who was in nature of preſident, and called *capitalis juſticiarius totius Angliæ*; it was he who * chiefly determined

* Page 19.

† Matters civil and criminal were debated in the free-borough gemote, the hundred gemote, the trithingha or leth gemote, and in the ſeyre gemote, but in this witena gemote (as it is erroneouſly called) the buſineſs was to promulgate a conſtitution or whole code of laws at one and the ſame time.

‡ The contrary of this poſition appears throughout the whole of *William* the Conqueror's own *conſtitution*, which is an ample compleat confirmation and re-eſtabliſhment of all the laws, as well as the annual, or rather ſemeſtral, parliaments of *Edward* the Confeſſor. *Hoc quoque precipimus* (ſaith he) *ut omnes habeant et teneant leges Edwardi regis* in omnibus rebus, *adjunctis his quas* CONSTITUIMUS *ad utilitatem Anglorum.*

determined all pleas, and with him sat the chancellor, † the treasurer, constable, ‡ marshal, seneschal, and the chamberlains.

No cause of consequence was determined without the king's writ: for even in the county courts, of the debts, which were above 40*s*. there issued a *justicies* to the sheriff, to enable him to hold such plea, where the suitors are judges of the law and fact.

So likewise the writ of right issued out to enable the lord to hold plea of lands within his jurisdiction, for it grew a maxim among the *Normans, that no one could hold lands without the king's patent, nor plea above* 40*s. without the king's writ.*

These writs were tested by the *justiciar*, and generally returnable into the king's court, and wherever the court sat either *in aula regis*, where they sat on the * criminal side, or on the revenue, which was above stairs; if the writ was returnable at either of those sittings, as the party appeared they proceeded to hear the cause, and give their judgment: the civil proceedings were minuted by the officers attending, either in the criminal court, or in the revenue; so that civil pleas are formed both in the sovereign § eyre of the king, and in the Exchequer.

* Page 20.

Though

† The chancellor was not then the great law-officer he now is: for his province was that of a notary-royal, as the very name itself imports, CAN or CON signifying the king, and seller or rather *sealer* signifying an officer authorised to SEAL all public documents, and the office itself, was called the Chan-*cery*, because the king's wax or CERA was there kept in safe-custody.

‡ The constable was an officer attendant on the king's residentiary or itinerant palace, as well as the marshal, steward and high chamberlain, were household officers introduced into this kingdom by *William* the Conqueror.

§ This sovereign eyre of our *Saxon* kings in *propriis personis* was only made once in every seven years, and 48 days notice was always previously published. See *William Florilegium sub anno* 1261; but this septennial perambulation of the kingdom running into *disuse* through the indolence of our *Norman* kings, *Henry* the second,

Though both the civil and criminal buſineſs was diſpatched by theſe officers, yet they had ſome buſineſs that was peculiar to each of them; the *juſticiar* preſided in the court as the head, and therefore called *capitalis*; all patents were formed by the chancellor, and the ſeal put to them, and he had the cuſtody of the ſeal of the court both for writs and patents; all manner of accounts were chiefly audited by the treaſurer; and therefore * in his office the great roll, now called the pipe-roll, was made up, and was a rent-roll of the king's whole eſtate; from thence they ſent extracts, now called the ſummons of the pipe, to each ſheriff, who was his bailiff in each county, to gather his revenue; and the ſheriff came in and accounted at *Michaelmas* and *Eaſter*, and brought in the money from each bailiffwick; the ſheriff let the king's demeſnes, and likewiſe gathered his rents and fines all but the wardſhip and eſcheats, which belonged to the eſcheator, a proper officer appointed for that purpoſe in every county. * Page 21.

The ſheriff accounted likewiſe for the profits of his torns, hundred courts, and wapentakes, and ſometimes they farmed them at † a certain rent from the crown.

To the conſtable and marſhal chiefly belonged the care of matters of honour, war, and peace; * * and therefore all ‡ foreign facts committed by the king's ſubjects were referred to them to determine * * Page 22.

ſecond, in the year 1176 revived it in ſome degree, and inſtead of enjoining our kings to go this ſeptennial circuit in their proper perſons, at a great council then holden at *Nottingham*, "*Ex aſſenſu filii ſui Henrici junioris et magnatum Angliæ regnum in ſex diviſit partes, earumque ſingulis tres conſtituit juſticiarios.*" And theſe judges in eyre were to go the circuit for the future inſtead of our kings; and here we have the origin of the inſtitution of juſtices in eyre.

† The citizens of *London* farmed the ſheriffwick of the county of *Middleſex* at the rent of 300*l. per ann.* which is the preciſe rent they pay for it at this day.

‡ Theſe great officers of ſtate had conuſance of all trials *par battail* between ſubject and ſubject *within* the realm.

termine according to the law of nations and of arms.

From the beginning of the holy war, which was ſoon after the conqueſt, there was a common law of nations and arms that went thro' all chriſtendom, and the honour of knighthood was univerſal. So likewiſe in *Richard* the firſt's time the laws of † *Oleron*, tranſcribed with ſome variation from the *lex Rhodia*, were brought into this kingdom.

The common law of nations and arms was ſuppoſed to be beſt known to the conſtable and marſhall as attending the king's armies; and therefore theſe matters were referred to them.

The quarrels and diſputes between the king's
Page 23. menial ſervants were * determined by the ſeneſchal and marſhal.

‡ The marſhal was alſo to keep priſoners, and take care that no indecency was committed in the king's houſe.

The

† The laws of *Oleron* were aboliſhed by king *John's* Magna Charta. For our early *Norman* kings having very great and extenſive dominions in *France*, and *Oleron* lying within that dominion, and being entirely under the government of French laws, thoſe laws were declared to have no force nor authority here in *England*. For, when it is ſaid in the great charter that *nemo imprijon.tur*, &c. *niſi* per legem terræ, and in another article of the ſame charter, *niſi per* LEGEM REGNI, the phraſes *lex terræ*, and *lex regni*, are to be taken and underſtood emphatically there uſed in expreſs contradiſtinction to the *lex Normandiæ*: or *lex Acquitaniæ*, or the *lex Andinogaviæ* (i. e. *Anjou*) all which French laws as well as the French modes of pleading had as it were ouſted the *lex* REGNI. But as only theſe *French laws* and not the *French modes* of pleading in our law courts were aboliſhed by this great charter, ſo the French modes of pleading having not been *literally* aboliſhed at the ſame time, this charter was afterwards interpreted according to the letter of it, and this is the reaſon that the French mode of pleading hath continued in a great meaſure even to the preſent times. *N. B.* By the *lex terræ*, and *lex regni* is underſtood the laws of *Edward* the Confeſſor confirmed and enlarged as they were by *William* the Conqueror: and this conſtitution or code of laws is what even to this day we call "the common law of the land."

‡ The marſhal was alſo to ſit in the palace of the king, and, thus ſeated, hear and determine all pleas of the crown ariſing within the verge of the court: but neither the marſhal nor ſeneſchal were to hold pleas of frank-tenement.

The chamberlains were to count the king's money, as it came in and iſſued out of the treaſury.

The king's ſovereign eyre or court removed with the king wherever he went, and wherever he went the torn in that county ceaſed.

On coming into any county, all matters depending in the torn were brought into the eyre, and when there, the record was never afterwards parted with; but becauſe the *eyre* was only ambulatory in the county where the king removed, they found it neceſſary that there ſhould be *eyres* that ſhould go the circuits, through the ſeveral counties in *England*; and thoſe in * their circuits ſuperſeded the torn, wherever they came, and tranſacted all manner of civil and criminal buſineſs. * Page 24. *Poſt* 28.

They went the † circuits from ſeven years to ſeven years; and thus the juſtice of the nation ſtood till about the time of the barons wars.

When the court received any plea, if it was matter of fact, it was tried by a jury of the county, impanelled before the *juſticiar*, or by the law wager in debts upon ſimple contract; for they thought, if the plaintiff truſted to the honeſty of the defendant in lending his money without ſpecialty, he ought to truſt his conſcience in the diſcharge; but if it was denied, then the witneſſes were joined with the jury to atteſt the truth of the deed; this was according to the feudal inſtitution, the *pares curiæ* ſigned the inveſtiture, and, wherever it was queſtioned, atteſted it: therefore * in all pleas of land the method was to produce the inveſtiture ſigned by the *pares curiæ*; but where the inveſtiture could not be found they joined iſſue by battle. On the writ of right, which was often the *Saxon* form, the defendant had his choice to try it either by a jury, * Page 25.

† Theſe juſtices in eyre were laid aſide by *Edward* the firſt, who in their ſtead appointed juſtices of aſſize.

jury, or a battle; but becauſe the battle was of uncertain event, the aſſiſes were afterwards invented.

The battle ſeems to be a very uncertain way of trying property; and therefore it was in the defendant's choice, who was in poſſeſſion, whether he would try it in that manner or not, and if he could produce his inveſtiture, he was ſure to prevail *coram paribus*; and if any perſon was got into poſſeſſion by forcible diſſeiſins, they removed ſuch treſpaſs in the torn by an inquiſition, that ſo he who had *jus poſſeſſionis* might defend
* Page 26. the title in the action: but becauſe the trial * was to be *per pares*, the ſovereign eyre ſeldom took conuzance of cauſes out of the counties; and therefore it was neceſſary to ſend juſtices in eyre, that the cauſes in each county might be tried; if they did not take conuzance of cauſes out of the county where the court ſat, they were forced to ſend inquiſitions to ſheriffs, and afterwards to juſtices in eyre to try the fact, and afterwards to ſend it into the king's court.

On the criminal ſide, crimes were preſented on articles of inquiry, as in the *Saxon* times, but they did not on ſuch preſentments put them to their † *ordeal*, but introduced a petit jury in the ſtead to try the priſoner, and therefore the priſoners did not uſe to produce their evidence to the firſt jury, as they had formerly done, when they were put to their *ordeals*.

* Page 27. * From thence they only gave the grand ‡ jury ſuch evidence as was ſufficient to accuſe. This was a great

† I have already explained this trial by ordeal, and alſo the inſtitution of the petit jury, or jury of the court *lit*, I ſhall only further obſerve, that the law-proceedings, at the time this court was inſtituted, being all in the French tongue, and the letter *i* being founded in that language like the Engliſh *ee*, is another reaſon for writing the word "*leet*" inſtead of the true orthography "*lit*."

‡ This jury was called *grand*, becauſe, before they ſeparated themſelves from the county court as I have mentioned already, it was

a great reformation of the law; for in the *Saxon* times the greater offences were tried by the *ordeal*, and the leſſer by compurgators; both of which were inſufficient methods of determining cauſes; and therefore the changing this into a petit jury was of great advantage. When theſe judges in eyre *itinerant* returned, they lodged their records in the king's court of Exchequer, many of which ſtill remain; and for the fines and amerciaments, which were in ſuch courts, proceſs went from the Exchequer; and therefore on the diviſion of the courts the record of the fines and amerciaments were kept in the ſeveral courts, and only extracts out of them were tranſmitted into the Exchequer.

* But the juſtices in eyre had a larger authority than any of the other courts; for when the cauſe concerned the king's revenue, they could give day into the king's ſovereign courts. So that the *juſticiarii itinerantes* were ſuppoſed to communicate with the *juſticiarii reſidentes*, and to ſupply their places in all the counties where the ſovereign eyre was not. * Page 28.

As the torn was ambulatory through the whole county, ſo the king's court originally perambulated through the whole kingdom: and after the conqueſt, when the kings diſcontinued the method of making their circuits through the whole kingdom, they then appointed juſtices in eyre, who went in their ſtead with a delegated power, but were always eſteemed part of the king's court exerciſing their juriſdiction within the counties; but being no more than a * delegated power, there was ſtill a writ of error from them *Ante* 24. * Page 29.

---

was compoſed of all the *epiſcopi, comites, vicidomini, vicarii, centuarii, aldermanni, præfecti, præpoſiti, barones, vavaſores, tengrevii, & ceteri terrarum domini comitatus*; but this grand jury being afterwards excuſed their attendance on this court by a ſpecial act of parliament, the grand jury of the preſent times is compoſed only of knights and other freeholders.

them before the king himſelf, and in the palace of *Weſtminſter*, where the ſeat of his chief reſidence was, there were *reſidentiary* juſtices, who heard and determined all cauſes in the king's abſence; but there were often commands given to bring ſuch plea before the king himſelf.

The juſtices in eyre had ſeveral articles, which they gave in charge, and proceeded upon, and lords of liberties came the firſt day and made their claims, that they might hold pleas within their franchiſe at the ſame time, and that the juriſdiction of the eyre might appear, and when the charters were loſt thoſe claims were allowed as evidence of their franchiſe.

Continual claim.

The marſhal (as has been ſaid) being to take care of the priſoners, did attend the king's court; but when the juſtices became * ſtationary, there was likewiſe a ſtationary priſon, which they called *the Fleet*.

* Page 30.

The *juſticiar* of *England's* † power was that, which united the king's courts under one head, and being ſo great an officer he was dangerous to the government, and obnoxious to the baronage, towards the end of the former period.

Jeffry Peterſon, made *juſticiar totius regni*, and continued till 15 *John*, got ſo great a power, that he became uneaſy to the crown. So that king *John*, from his death, ſwore he then began to be king of *England*, and though there were two *juſticiars* afterwards in his reign, they continued but for a ſhort time; for † *Peter de Rocher* was not long in his office, and being a *Poitivin* was not grateful

† The power of this JUSTICIAR, in the abſence of the king from *England*, was that of a vice-roy, and in his ſingle perſon centered the whole *regency* of the kingdom.

† King *John*, on his going to *Poictiers* in the year 1213, conſtituted in his place *Peter biſhop* of *Wincheſter* (by lay-name *Peter de Rape*) JUSTICIAR of all *England*; *Hubert de Bergo* was alſo appointed to the ſame high office in the year 1214, as *William* Earl of *Pembroke* alſo was in the year 1216.

grateful to the *Engliſh*, and as to *Hugo de Burgo*, it is uncertain, whether he was *juſticiar*, or not.

* It plainly appears king *John* had a deſign to lay aſide the power of the *juſticiar*; and therefore he readily granted an article in the *grand charter*, that there ſhould be reſidentiary juſtices, and that Common Pleas ſhould not follow his court, but be held in ſome † certain place: whereupon

* Page 31.

† This article of King *John's* magna charta hath been totally miſunderſtood. For when he ſays "*communia placita teneantur in aliquo* certo loco," he only means to reſtore to the people their ancient manner of holding the county and hundred courts, which had been interrupted by there being two different kings then *acknowledged* in *England*, namely king *John* and *Lewis* the *Dauphin* of *France*. In theſe turbulent times, the county and hundred courts followed the temporary local palace of the reſpective kings. The king had this power of removing theſe great courts upon any very urgent occaſions, as appears by the following confirmation of a moſt ancient inſtitution by *Henry* the firſt, "*Sic ut* antiqua *fuerat* inſtitutione *formatum, ſalutari regis imperio vera nuper eſt recordatione firmatum generalia comitatuum placita et definito tempore* CERTIS LOCIS *per ſingulas Angliæ provincias convenire debere, nec ullis ultra fatigationibus agitari*, niſi propria regis neceſſitas, *vel commune regni commodum ſæpius adjiciat.*"

Agreeably to this ancient inſtitution, the barons required of king *John*, that the county and hundred-courts, which in thoſe times were the real and only parliaments of the kingdom, ſhould not follow the king, wherever he ſhould be pleaſed to command their attendance, but that on the contrary they ſhould be holden, conformably to the ancient cuſtom of the realm, *in ſome certain place in every county*, throughout the whole kingdom. But the cuſtoms of *France* prevailing then, and being ſtill more adapted to the temper of *Henry* the third, who was ſon and ſucceſſor of this *John*, he formed a plan to abliſh theſe provincial parliaments, and the firſt ſtep he took to accompliſh his deſign, was to remove *part* of the buſineſs of theſe provincial parliaments near his own reſidence. Accordingly he erected a new court in *Weſtminſter-Hall* for this ſpecial purpoſe, well knowing that if he could draw one part of the provincial buſineſs immediately under his own eye, (where conſequently it would be more ſubject to his influence.) that every other part, worth notice, would ſoon follow, and thus a reſidentiary court, now ſtyled the Court of Common Pleas was erected in *Henry* the third's reign, (and not in that of his father *John*) and was opened on the 6th of *July* 1233, which tallies with the 19th year of *Henry* the third, *Robert de Ros* being appointed the firſt chief juſtice, *Robert de Bellchamp*, *Regin de Moyun* & *Robert de Rokely*, the other three judges.

whereupon a reſidentiary court was eſtabliſhed at *Weſtminſter* as a ſtanding ſeat of juſtice; for the determination of ſuch pleas as were merely civil, and belonged to the ſubjects between themſelves; and thus began that court now called the *Common Pleas*.

THE HISTORY AND PRACTICE OF THE COURT OF COMMON PLEAS.

CHAP. I.

Of the Court.

THE ſtile of this court is, PLACITA *apud* Weſtmonaſterium *coram* Petro King *milite, & Sociis ſuis, Juſticiariis Domini Regis de Banco, de Termino Sancti* Michaelis *Anno Regni Domini* Georgii, *Dei Gratia,* Magnæ Britanniæ, Franciæ, & Hiberniæ, *Rex, Fidei Defenſor', &c. ſecundo.* And becauſe all civil cauſes between ſubject * and ſubject were to be determined there, therefore † this

* Page 1.

* Page 2.

† During all the reigns of our Saxon and Daniſh Kings, and even to the ſeventeenth year of *Henry* III. when this court was inſtituted as a reſidentiary national court in *Weſtminſter Hall*, all pleas, civil as well as criminal, were tried and determined in the reſpective counties where the cauſe of action aroſe: *per ſingulas Angliæ provincias nec aliis ultrà fatigationibus agitari.* Vide Leg. Hen. *primi.* And as every county in all judicial matters was a ſeparate diſtinct *community*, and as all cauſes were heard and (if not too difficult) determined by a majority of ſuch *community*, ſo the

this court was ſtiled *Communia Placita*, or *Common Pleas:* and the word *pleas* anciently ſignified the convention of ſtates *in campis*; and becauſe in thoſe conventions of the ſtates, all cauſes were heard, debated and determined, therefore by corruption the cauſes got the name of *pleas* from the court where they were decided; and therefore the court, that was particularly erected to hear and determine civil cauſes, was called the *Court of Common Pleas.*

This court's authority is founded on original writs iſſuing out of *Chancery*, which are the King's mandates for them to proceed to determine ſuch and ſuch cauſes; for it was a *maxim* among the *Normans*, that there ſhould be no proceedings in
Reg. 179. b. the king's court in *Common Pleas*, without the king's writ; therefore a writ always iſſued to warrant this court's proceedings; and thoſe iſſued out of *Chancery*, becauſe when the courts were but one, the Chancellor had the ſeal, therefore when they were divided, he ſtill keeping the ſeal, ſealed all original writs: by this method the ſeal was a check on the other courts to know what cauſe was there, and likewiſe that the fines for having juſtice in the king's court ſhould be anſwered in the court of *Chancery* before there were
* Page 3. Fleta 58. any proceedings; and therefore * *Fleta* ſays, *Dum tamen*

---

the cauſes, thus adjudged, were called *placita communia* or *common pleas* or the *pleaſure* of the community, that is to ſay, they were determined *judicio communitatis iſtius*, by the judgment of that community; the accuſtomed mode of pronouncing that judgment was expreſſed in a very few *words*, as may be ſeen in king *Alfred*'s laws "*Him liccde eallum*," which in modern Engliſh is "that it *liked* them all." Where note, that the word *licede*, or liked, is the ſame word as *licet*, in Latin. In fact, this conciſe mode of pronouncing judgment ſtill continues to this day in the Houſe of Peers, and is expreſſed by the word "*contents*." From theſe obſervations I conclude that the word "pleas" is an abbreviation of the word *pleaſure*, which is ſynonimous to that of *content* in Engliſh, *licede* in Saxon, *licet* in Latin, and *placart* in Dutch, which is only a corruption of the word *placet*, or in France as well as here in England, when judgment is given by the king, "*Le Roy le veut.*"

tamen warrantum per brevium regis cognoſcendi, nam ſine warranto juriſdictionem non habent neque coertionem.

And *Britton* ſays, on the eſtabliſhment of this court, that they ſhall plead ſuch * *Common Pleas* as we ſhall command them by our writ, ſo that the proceedings on our writs may be recorded. Britton, c. 4.

But this is to be underſtood when the cauſe is to be between common perſons; for when an attorney, or any perſon † belonging to the court is plaintiff, he ſues by writ of privilege, and is ſued by bill, which is in nature of a petition; both which originally commence in the court of *Common Pleas*, and have no foundation in *Chancery*.

There are two ſorts of writs, *viz.* ‡ *Breve nominatum & innominatum*; the firſt contains the

* It is well worth obſerving that *Britton*, who was cotemporary with *Henry* the third, in whoſe reign this court of Common Pleas was erected, does not ſay, the Common Pleas muſt abſolutely and neceſſarily be holden in *Weſtminſter Hall*: on the contrary, he expreſsly ſays, they ſhall be holden at *Weſtminſter*, "Ou ailleurs, la ou nous voudrons ordiner," *or any where alſo, where we* (the King) *will ordain.*"

† This mode of ſuing a perſon *belonging* to this court by writ of privilege is conformable to and grounded upon the *common law* of the land, properly ſo called. This common law is no other than the laws of *Edward* the Confeſſor confirmed and enlarged by *William* the Conqueror, in which code, Law 33. it is *inter alia* eſtabliſhed for ever, *ut omnis homo* pacem *habeat eundo ad gemotum, vel rediens de gemoto, niſi probatus fur fuerit.*

‡ See the origin as well as the grounds and *reaſon* of theſe writs, in the laws of *Hen. prim. cap.* 29. *Si de* nominatis *placitis (vel brevibus) implacitatus non erat, tunc termino congruo cauſa ſue proſequende facultatem habeat. Si de* nominatis *placitis terminum non ſuſceperat (niſi competens* Soigne, *i. e. Eſſoign) eum detineat. Si non venerit, omnium rerum ſit, de quibus placitum* nominatum *ſuſcepit*, and again *cap.* 46. *Si quis a domino ſuo, vel juſticia per ſuam, vel alterius ſuggeſtionem implacitetur, ſubmoneatur ad ſeptem dies in eodem comitatu, de* nominatis *vel innominatis placitis, & ſi lex domino vadietur, differat cætera placita (niſi ſint capitalia) donec lex deducatur per* burgi-legum, *i. e. per legam decenne vel frie-burgi, et nominentur ei placita, et inde ad ſeptem dies reſpondeat, quod velit.* And again *cap.* 50. *Si quis a domino vel prælato ſuo de* nominatis *placitis ſecundum*

legem

time, place, and demand, very particularly; as the other contains only a general complaint, without the expreſſion of time or damage; as the action of treſpaſs, which might have been at any time done, and was intended to defend the eſtate itſelf againſt the invaſion of the neighbours, and ſeems to have been allowed thus general originally before the diſtinction of bounds; and therefore the † *vill* only was alledged where the treſpaſs was ſuppoſed to be done; the plaintiff alſo might count of any treſpaſs committed before the ſuing out of the original.

* Page 4. * Every thing, that comes within the compaſs of the writ, may be comprehended within the declaration; but the declaration cannot in any manner be extended beyond the writ; for in this the common law differs from the civil law; they begin with a libel, from thence there iſſued a citation mentioning the plaintiffs and defendants names, and the name of the judge; and the apparitor having cited the party, he was to take out a copy of the libel. In the beginning he had *ſolemnes formæ*, ſo that they held *qui cadit in libella cadit in cauſa*; but afterwards they changed it with leave of the court: but there could be nothing of this at common law, where the *Chancery* iſſued the writ, which gave the *Common Pleas* authority to proceed; and therefore they could not alter or change the nature of the action, becauſe the original

legem (*i. e. legem Edwardi, alias legem-communem, vulgo dictum*) *placitatus ad diem conditum et non venerit, omnium placitorum de quibus* nominatim *implacitabatur, incurrit emendationes, niſi competens aliquid reſpondaverit. Aliud enim eſt ſi quis a domino ſuo ſubmoneatur ut illo vel illa die ſit ad eum et placitum ei* nominetur, *et aliter ſi ita expreſſe ſit* mannitus (*i. e. ſummonitus*) *ut ei placitum* non nominetur, *&c.* *N. B.* Theſe laws of *Henry* the firſt, and the incidental mode of pleading, were the groundwork and baſis of king *John*'s Magna Charta, and therefore are of the higheſt authority.

† The Vill ſeems to be alledged of neceſſity in conformity to the 23d article of king *John*'s great charter, where it is eſtabliſhed that *nec* VILLA *nec homo diſtringatur*, &c.

ginal writ was the ground of the whole proceedings; ſo that whatſoever could be compriſed in the writ, however multifarious, might be compriſed in one declaration; but whatever could not be contained in one writ, could not be comprehended in the declaration, becauſe the declaration was to be conformable to the writ.

Theſe original writs were contained in the *Regiſter*, which was a book preſerved in the *Chancery*, where the forms of the writs, as well thoſe that were brought from * *Normandy* as thoſe which were added by maſters in *Chancery*, were tranſcribed: they divided the writs relating to lands into *droitural* and *poſſeſſory*; and writs relating to perſons into thoſe *ex contractu*, & *ex delicto*. Under *ex contractu* was couched debt, which was to reſtore the ſame in *numero*; and the other the ſame in *ſpecie*, or damages; and alſo actions of account, covenant, and annuity, &c. Actions *ex delicto* were either for treſpaſſes founded on *force*, which were treſpaſſes *vi & armis*; or upon fraud, which were † actions upon the caſe.

* Page 5.

Theſe, whether they were the beſt diviſions that could poſſibly be formed, yet gave the rule

† Actions upon the *caſe* were not limited to *fraud* only: they compriſed all ſpecies of actions, for which as there was no remedy at common-law, *i. e.* by the laws of *Edward* the Confeſſor as enlarged and confirmed by *William* the Conqueror, ſo conſequently there could be no *form of writs* for ſuch actions found in the regiſter, hence, when the common-law came thus to be broken through, it became neceſſary that there ſhould be new writs formed to tally and ſquare with ſuch offences and crimes, and the forming theſe writs according to the nature of the offence or crime was aſſigned to the proper officer and clerks belonging to the regiſter office. But this practice being conſidered as an innovation on the COMMON-LAW, it was thought neceſſary to declare or enact it law, which was accordingly done in the 30th year of *Edward* the firſt. But this king did not venture to authoriſe thoſe actions on the caſe, except it were in caſes where there was no remedy at common-law. Vid. 13 *Ed.* I. c. 50. *Super vero ſtatutis* in DEFECTU LEGIS *et ad* REMEDIA *editis, ne diutius querentes cum ad curiam venerint, recedant de remedio deſperati, habeant brevia ſua* " in ſuo caſu *proviſa*." It is in this ſtatute we find the origin, grounds, and boundaries of actions on the caſe.

of what could, or could not, be contained in one declaration.

Cro. Car. 316. 1 Vent. 366. 3. 36. 4. 13: Broke, *Joinder in action* 97. Regiſter 139. 7. H. 7. 4. Broke. *Joinder in action.* 90.

Thus debt on an obligation and on a *mutuatus* may be joined in the ſame declaration; becauſe the writ is general; and the declaration upon both will be warranted by the authority given in the general words in the writ: So you may join debt and detinue in the ſame declaration, becauſe there are writs in the *regiſter* in which both are compriz-ed in the ſame writ: ſo you may join debt upon a leaſe, and for cloaths, they being in the words of the ſame writ: but debt and account, or debt and treſpaſs, cannot be joined in the ſame declaration, as there are for each ſeveral * writs, and one does not warrant a declaration upon the other.

* Page 6.

1 Vent. 223. 365. *vid.* 1 Salk. 10 *cent.* 1 Sid. 244. per Holt *cent.*

Several treſpaſſes may be joined, becauſe they likewiſe are compriſed in one writ; and ſo ſeveral actions on the caſe, where the caſe is of the ſame kind, may be joined in the ſame declaration; as an action for a fraud on the delivery of the goods, and on the warranty of the ſame goods, being both on the contract: ſo againſt a common carrier, on the cuſtom of the realm, and trover may be joined, becauſe both on the tort, it being a violation of them not to deliver the charge, held *contra Dalſton* v. *Janſon*. The firſt count being on contract, lord *Ray*. 58. *&c.* S. C.

2 Show. 250. ſays they were forced to declare in the deceipt only.

2 Lev. 101; Raym. 233. 3 Lev. 99. 1 Keb. 870.

But an *Aſſumpſit* and *Trover* cannot be joined; for the *mutuatus* was turned into the *aſſumpſit*, yet it is ſtill on the contract, and different in its nature from a tort; and ſo they have never conceived one writ on caſes ſo diſtinct as on a contract and a tort which though they come under the general head of actions on the caſe, yet are more diſtinct caſes than debt and account, which cannot be joined. It is doubted in *Lev.* if being ſeparated it be cured by the verdict, as it is clearly ill on demurrer.

The true reaſon why an action may, or may not be joined, is not the difference of the defendant's pleas; for if that was the reaſon, they could not join a debt upon * obligation and a *mutuatus*; for the general iſſue upon obligation is *non eſt fact'*,

* Page 7.

fact', and upon a *mutuatus, nil debet:* but one reaſon of joining actions ſeems to be, where the proceſs and the fine upon the original are of the ſame ſort. Now in debt the old proceſs was ſummons, attachment, and diſtreſs; and † there was no *capias*, becauſe the man that committed a tort might be ſuppoſed to fly from juſtice; now as ſoon as a writ was returned it was filed, and then the *Filazer* was to iſſue proceſs upon that writ; and therefore they were to continue the writ, ſo that the *Filazer* upon every writ might iſſue his proper proceſs. There were likewiſe fines upon originals in debt upon the taking them out, which were in the nature of *Compoſitions* for private perſons ſuing in the king's courts, in order to have the beſt and moſt ſpeedy and proper juſtice; but the fines upon treſpaſs were not upon taking out the writs, but they were according to the nature of the tort in the judgment: hence it was, that all matters of debt might be put in the ſame action, becauſe the fine upon the original was in proportion to the ſum demanded; but they did not mingle debt and treſpaſs, becauſe the fine upon the treſpaſs was in the judgment; alſo the judgment in debt and treſpaſs was different, and therefore they could not be mingled in the ſame original; for * upon the action of debt they had only an amerciament which was aſſeered in the county; but upon treſpaſs the court ſet a fine, ‡ and levied it by a *capiatur*.

Proceſs.

Fine.

* Page 8.

† There was no capias in debt, as the *firſt* or leading proceſs, not for the reaſon here given, but becauſe ſuch a capias is a direct and manifeſt violation of the 39th article of King *John*'s Magna Charta, "*nullus liber homo* capiatur *niſi per legali judicium parium ſuorum, vel per* legem terræ. The lex terræ is *William* the conqueror's conſtitution, *Edwardi ſancti nullatenus in patria remanebunt, ſed ſtatim jurabunt ſe ituros ad mare infra terminum a juſtitia eis conſtitutum & mox tranſfretaturos quam cito habuerint navem et ventum, et quisquis eos invenire, poterit poſt certos dies, faciat de eis juſtitiam* ſine judicio. *Vid. leges Ed. Sanc. c.* 19.

‡ For the *capiatur* in treſpaſs, ſee the note in page 14.

These writs were delivered to the sheriff, who was the king's bailiff in every county, and to be by him returned into the *Common Pleas*; but the sheriff before the return of such writ was obliged to take pledges of prosecution, which (when the fines and amerciaments were considerable) were real and responsible persons, and answerable for those amerciaments; but those ‡ amerciaments being now so inconsiderable, there are only formal pledges entered, *viz. Johannes Doe* and *Richardus Roe:* but there is a difference in trespass and in debt; for in trespass the attachment on the goods is the first process, and by which the defendant is hurt, therefore the writ commands that the sheriff should first take pledges before he executes the process; but in debt they begin with a summons, and the party is not injured in the first instance, therefore there is no command in the writ to the sheriff to take pledges; but unless he does, there is not sufficient authority from the return to warrant further process, unless pledges be put in above, as in the *King's Bench* they always do on the bill; the reason why pledges were not taken in *Chancery*, but committed to the sheriff, was, that he living * in the county was supposed to know who were sufficient security, and being to levy the amerciament afterwards, they were to take ample security for them.

* Page 9.

The

‡ These amerciaments are not inconsiderable *per se*, they are only become so *per accidens*: That is to say, the value of money being at this day, encreased two or three hundred-fold to what it was in the reigns of our Saxon, Danish, and early Norman Kings, the amerciaments (which in those days were fixed and certain) now bear a proportion to the decreased value of gold and silver. Thus a horse, which in the payment of a were-gild was then valued at twenty shillings, would now be valued at twenty pounds, and an ox, which was valued at ten shillings only, would now be valued at ten pounds. See the laws of *William* the conqueror, chap. 10. *En la* Were *parra il rendra chival que ad la cuille, per* xx *solz, e tor per* x *solz*" in modern French "*en redemption de sa* guerre (*were*) *il peut estimer un cheval qui a sa queue, a vingt shillings, et un beuf a dix shillings.*"

The original is returned to the *cuſtos brevium*, who is the *Common Pleas* officer appointed to keep them; ſo that that which was an authority for the court to proceed, might be lodged with a certain officer, in order that ſuch authorities might be always forth-coming; and therefore to keep theſe original writs returned was his only buſineſs.

Theſe writs have *fifteen* days between the teſte and return, excluſive of them both, in order that there may be time for the ſheriff to make the ſummons, and that the party might come up, though it were in the remoteſt part of *England*. Booth. 5.

The law days, which were formerly † from three weeks to three weeks in the *Saxon* courts, are now reduced into terms, which are all one day. That the buſineſs of the ſeſſions might be tranſacted at once in the King's Courts, the terms were ſo appointed in *winter* and *ſummer*, as that proper vacations were left for ‡ Holy-days, for ſeed-time and harveſt, and for the *juſticiari reſidentes* to keep the aſſizes in the counties after *Hillary* and *Trinity* Terms, which are called iſſuable terms.

The terms themſelves were divided into ſeveral return-days, and the writs were to be made returnable at each of thoſe days; and *interſtitia* were then made, that the buſineſs of one return might be diſpatched before that of another began, and therefore *Fleta, fol.* 86. ſays, *et proviſum eſt quod juſticiarii de utroque banco placita ad unum diem adjornata perficiant antequam de placitis diei ſequentis quicquam* * Page 10.

† The Saxon law days (ſee p. 52) were from four weeks to four weeks, ſee the laws of *Edward* the elder, Ch. 11. in modern Engliſh word for word, "I will that each ſheriff have the mote (or meeting) at every four weeks."

‡ The bare holy-days excluſive of Sundays, were 53 in number, as appears by the laws of King *Alfred, cap.* 39.

quicquam pl'itare incipiant, hoc tamen excepto quod eſſon' illius diei ſupervenientis admittantur & adjuceantur & reddantur.

CHAP. II.

Of Proceſs.

PROCESS is twofold, (*viz.*) *real* and *Perſonal*.

Firſt.

Real. This was a ſummons to make the tenant appear at the lord's court, and afterwards, when the proceſs is to be returned into the king's court, if the party did not appear, or ſend an excuſe to the lord's ſummons, to anſwer in a plea of lands, this was reckoned a breach of feudal duty; becauſe he was obliged to attend his lord's court, ſo that the lands in queſtion were immediately † ſeized into the lord's hands; * and if he did not appear on that ſeizure, they were by judgment awarded to the demandant, as the perſon taking on himſelf the feudal duties which the former tenant had refuſed: but if he came in on the ſeizure, he might excuſe his non-appearance, either by ſhewing that the bailiff of the court had not ſummoned him, or inundation, tempeſt, impriſonment, or other invincible neceſſity, that his non-appearance was not want of duty in him.

* Page 11.

Booth. 21. Jon. 25. And if after appearance, he made default at a day given, proceſs went out to ſeize his lands; and if he did not appear on the ſeizure, and excuſe

† The lands were not ſeized either into the king's or landlord's hands upon the firſt default, as appears by the *lex terræ*, c. 65. "*Requiratur hundredus et comitatus (ſicut anteceſſores ſtatuerunt) et qui juſte venire debent et noluerint, ſummoneantur ſemel, et ſi ſecundo non venerint accipiatur unus bos; et ſi tertio, alius bos; et ſi quarto, reddatur de rebus hujus hominis quod calumniatum eſt quod dicitur were-gel, et inſuper regis foris factura.*"

cuſe his default, it was a breach of duty in him, and his lands were adjudged to the demandant.

When the lord remitted his right to the king, and it came to the king as lord paramount, the proceſs in the king's court was formed upon the proceſs in the feudal courts below, and therefore the *magnum cape*, (i. e. *grand cape*) iſſued to ſeize the lands into the king's hands, and to warn the defendant to come to excuſe his default: if he did not on the return appear, and ſave his default, by ſhewing he was not ſummoned, or ſome invincible neceſſity as aforeſaid, judgment was given for the demandant, unleſs he releaſed the defaults; and then the *grand cape* was no more than the firſt ſummons, and the demandant *declared againſt him as if he had appeared on the firſt ſummons. This was often done, when there had been any fault in ſummoning the tenant; but if the demandant juſtified on his default, and the tenant ſaved his default, the writ abated; becauſe he puts the whole cauſe on the tenant's failure in his feudal duties, by not attending the court: if after appearance, day was given, and the defendant made default, a *petit cape* went out to ſeize the lands, and for the tenant to hear judgment; and if on the return, the defendant did not ſave his default, by ſhewing an invincible neceſſity, judgment was given for the demandant, becauſe this was a breach of his feudal duty; but when the tenant appeared and prayed an imparlance, if he made default, there ſhould not be a *petit cape* iſſued, but the lands ſhould be ſeized, becauſe it was a day given him at his own expence.

* Page 12,

Second.

Perſonal. According to the antient inſtitution the ſheriff was to ſummon; and this was done either perſonally, or elſe the ſummons was left at his houſe; and therefore the ſheriff was to return either

either *ſummoneri feci*, or *nil habet in balliva mea per quod ſummoneri poteſt*; on this ſummons the party
* Page 13. either appeared, or eſſoined, or made * default; if he appeared, they proceeded againſt him, and the defendant pleaded; of which hereafter.

There is an officer in the court, that is called the *clerk of the eſſoins*, and he keeps the roll on which were entered the eſſoins; and if the defendant on this roll has a day given him to a ſubſequent term, he cannot enter his appearance of the term in which the excuſe is given; for the plaintiff by the eſſoin-roll had the ſame day given him as the defendant had: And they will not allow the defendant to appear and plead in the † abſence of the plaintiff.

Cro. El. 367. If he eſſoined, (that is, he ſent his excuſe by a ſervant for not appearing,) the excuſe was to be ſent on the day the writ was returnable; for if he omitted that day, your exception might be entered the next day to his non-appearance, and you might have an order that the defendant's *eſſonium non recipiatur*; and from this exception ſo taken and entered, the ſecond day after the return of the writ was called the day of exception. The third day the ſheriff returned his writs into court, which were delivered into the cuſtody of the *cuſtos brevium*, and from thence this day was called the day of *returna brevium*; and then it was that the court was ſeized of the cauſe by the poſſeſſion of the writ. The fourth day was called the appear-
* Page 14. ance-day, or *dies amoris*, which was * the time granted *ex gratia* for the party to appear; if the party did not then appear, the plaintiff offered himſelf, and the filazer recorded his appearance, and that the ſheriff had returned, he either ſummoned

† This is a very juſt rule, it is grounded on the laws of *Henry* the firſt, in which it is ordained, *cap.* 31. "*Quicquid* adverſus abſentes *agitur in omni loco vel negotio agitur, penitus evacuatur.*"

moned the defendant, or that the defendant had nothing by which he could be ſummoned; and if the ſheriff returned *ſummoneri feci*, and the defendant did not appear, then he awarded an attachment and diſtreſs infinite in debt; † but in treſpaſs, becauſe there was a fine to the king, the king's proceſs (which was a *capias*) was awarded, or a diſtreſs, as the court thought proper; but if the ſheriff returned *nil habet in balliva mea per quod ſummoneri poteſt*, then the ‡ *capias* was awarded even in debt, and this came in by the ſtatute of *Marlbridge*, which gave the lords the ſame liberty of having their *bailiffs* in the *priſon*, as the king's accountant had before; and therefore the *capias* was awarded on the *Nihil* returned; § 25 *Ed.* 3. ch.

† By treſpaſs we muſt here underſtand real treſpaſſes againſt the peace, proſecuted not by way of preſentments or appeals, but, as *Britton* nicely diſtinguiſhes, "*Par forme de treſpaſs.*" And here the defendant ſhall not be intitled to any ſummons, but the firſt or leading proceſs againſt him is a diſtreſs by his goods and chattels, with four court-days, and then an award of the great diſtreſs. But NO CAPIAS CAN BE ISSUED AGAINST HIM IF HE HATH EITHER GOODS, CHATTELS, OR LANDS. Nevertheleſs if it be found by an inqueſt of the viſinage that the defendant hath *nihil*, then the ſheriff *teſtifying* and returning *nihil* may take the defendant by his body. This is the LEGAL proceſs of the *capias* in treſpaſs. And farther, if the ſheriff ſhall afterwards return a *non eſt inventus*, then the ſheriff *ſoit remande par breſe de* JUGEMENT, *que le defendant ſait demande de cenè en cenè juſqu' à tant quil ſoit utlagè s'il ne vient pas.*

‡ The *capias* in *debt* did not come in by the ſtatute of *Marlebridge*, for that ſtatute only provides a remedy between the *liege* lord and his *liege* bailiff, in matter of *account*: and, inſtead of a *capias*, ordains an *attachment per corpus ſuum*. *N. B.* The attachment always implies a contempt of court, as in this caſe, where the accomptant-bailiff, *flying* from juſtice, and in contempt by not appearing at his *own* lord's court, this attachment iſſues againſt his body, in the nature of an execution; and it is well-grounded: becauſe the accomptant-bailiff, being one of his lord's *ſworn* and bounden *ſervants*, and as ſuch being *in plegio domini ſui*, and having FLED from his bail, is very juſtly taken in execution, according to the *law of the land* laid down in the chapter of bails or "*de friborgis*" in the laws of *Edward* the Confeſſor.

§ The ſtat. of 25 *Ed.* 3. *c.* 17. does not refer to the ſtatute of *Marlebridge*, for that ſtatute neither gives a *capias* nor an exigent: but it refers to 13 *Ed.* I. *c.* 1. which gives both the *capias* and the exigent,

Ch. 17. brought in the ſame proceſs in debt, detinue and replevin; and † 19 *H.* 7. in actions on the caſe; if the defendant could not be arreſted on the *capias*, the *capias* being returned *non eſt inventus*, and filed with the *cuſtos brevium*, the plaintiff *ſe obtulit*, and the court granted an *alias* and ſo a *pluries*; all theſe are made out by the *filazer*, who is ſo called from the files, which were warrants for him to continue the proceſs.

* Page 15. Upon the return of a *non eſt inventus* upon the *pluries*, the plaintiff might ſue the defendant to Outlawry.

But the proceſs of outlawry being to put the defendant out of the king's protection, and by which he forfeited all his goods, and was impriſoned,

---

exigent. In this 13 of *Ed.* III. the whole proceſs in accompt from the firſt, to the very laſt ſtage is accurately delineated, ſtatuted and ordained. And the proceſs in this ſtatute ordained, ought, at this day, to be followed ſtep by ſtep, in actions of debt, detinue, replevin, and on the caſe. But the practice of holding to ſpecial bail upon a fictitious latitat, with an *acetiam* in the King's Bench, and the *acetiam* in the *clauſum fregit* of the Common Pleas, which were arbitrarily introduced into thoſe two courts in the laſt century, have entirely perverted the only true, legal and ſtatutable proceſs in debt, &c. and although many endeavours have of late been made to explode and extirpate the preſent proceſs by *capias* in the *firſt* ſtage, yet the practice hath prevailed, and probably will until it ſhall pleaſe the wiſdom of the legiſlature to interfere, and relieve the ſubject. The proceſs of *capias* and exigent given by the 25 *Ed.* 3. *c.* xvii. ought to be the ſame, *ſi come eſt uſée en brief d'accompt*, and in the writ of accompt here referred to, auditors muſt be aſſigned, before the accompt can be legally found in arrear, for if he be not in arrear he cannot be legally arreſted, *per corpus ſuum.*

† The *capias*, which the Chief Baron in pa. 14. calls the king's proceſs, is the *capias* that is awarded upon an indictment: and as the accuſation is at the ſuit of the king, the *capias* may not improperly be called the king's proceſs: and it ſeems to have acquired this diſtinctive appellation by the 25 *Ed.* 3. *c.* 14. in which it is aſſerted that *after* any man be endited of *felony* before the juſtices in their ſeſſions of Oyer and Terminer, the ſheriff be commanded "*D'arrecher ſon corp par brief ou precept, qu' eſt appellé capias.*" But the *capias* granted by this ſtatute is a *capias* in execution, and comes *after* judgment, for an indictment ſignifieth in law an accuſation found by an inqueſt of twelve or more upon their oath: and therefore is not any violation or infringement of the great charter.

ſoned, and loſt the profits of his lands, there was great care taken that no perſon ſhould be outlawed without ſufficient notice, and great contumacy to the proceſs of the court; and therefore not only three *capias's* were iſſued, before there could be proceſs of outlawry, but likewiſe there were three officers concerned in that proceſs, that it might not be made in the king's court behind the party's back: The firſt office is the chancery, from whence the original iſſued; the ſecond, the *filazer*, who made the *capias*, *alias*, and *pluries*; and the *exigenters*, who made out the exigent.

When the exigent went out, it was to be ſued to the county where the perſon really was, for there the tranſitory action was originally laid, for the creditor was to follow the debtor, wherever he was to be found; and becauſe the outlawry was only firſt for treaſon, felony, or very enormous treſpaſſes; therefore the proceſs was to be at the torn, which was the ſheriff's criminal court, and held not only before the ſheriff but before the coroners, who were † the antient * conſervators of the peace, being the beſt men in every county, to preſide with the ſheriff in his torn, and they pronounced the outlawry upon him; but, before this was pronounced, he was to be *quinto exactus*, for he had three days for appearance, and one for grace, and if he ſtood in contempt at all thoſe days, at the fifth county court he was pronounced outlawed by the ſheriff and coroners, and the ſheriff returned ſuch outlawry ſo pronounced on the exigent: after ſuch Judgment was obtained in the court below and returned by the ſheriff and recorded above,

* Page 16.

† If by the epithet "*antient*" we are to go ſo high as the reign of king *John*, then the coroners are not the antient conſervators of the peace, but thoſe 25 barons or great landholders elected for the ſpecial purpoſe of obſerving and keeping the famous PEACE made on the 15th *June* 1215, between king *John* on the one part, and the kingdom on the other. And in this elective body of conſervators of the PEACE, we may trace the origin of our preſent juſtices of the peace.

above, they could take out execution againſt the outlaw; which is either *general* to arreſt the body, or *ſpecial* to arreſt the body, extend the goods, lands, debts, and choſes in action, *Lut.* 330, 331. And when the inquiſition is taken, it is returned by the ſheriff into the *common pleas*, and then a tranſcript of the outlawry and inquiſition is tranſmitted into the *Exchequer*; and thereupon, if any debts be returned due from any one to the outlaw, on application to the Exchequer a *ſcire facias* iſſues to ſuch perſon, to ſhew cauſe why the king ſhould not have ſuch ſum found due on the inquiſition to the outlaw. The reaſon of returning the tranſcript of the record from the *common pleas* into the *Exchequer* is, for when the inquiſition has returned the outlaw to be poſſeſſed of any * goods or lands, he being out of the king's protection cannot enjoy any thing, and the profits of the lands are to be ſeized into the king's hands, but the lands are not forfeited, unleſs it be in a capital caſe, and then after the year and day he forfeits as if he had been convicted: but in other caſes, the profits are ſeized whilſt he continues outlawed; and therefore the tranſcript of his record is ſent into the Exchequer, that the court of ordinary revenue may have it in charge; but the court of Exchequer uſually grants a *cuſtodium* to ſuch perſon as ſued the outlawry.

* Page 17.

After judgment you may upon a *capias ad ſatisfaciendum*, without *alias* or *pluries*, have an *exigent*, and thereupon outlaw the defendant, becauſe he having been already in court before judgment, and having conuſance of the debt, he ought to pay the debt on the firſt ſuing out of the *capias*, otherwiſe it is a contumacy in not performing the judgment of the court, for which diſobedience he is put out of the king's protection; you may, after judgment in outlawry, have a *capias* in any county, becauſe he being a perſon outlawed, can have no property any where, but to be ſeized every

where; and if he be ſued to outlawry after judgment, there needs no *ſcire facias* to renew the judgment, after the year and day, becauſe, being outlawed, you may have execution * on his effects at any time, on behalf of the king; and there is no occaſion to give him a legal notice who cannot be found and who is out of the king's protection, and ſo cannot be heard. * Page 18.

Notwithſtanding the care taken by *Ed.* 1. in the formation of the court of *common pleas* for the due iſſuing of proceſs towards outlawry, yet outlawries were ſued where the plaintiffs never appeared in proper perſon; and therefore a penalty of 40*s.* is impoſed on the plaintiff for ſuing out an outlawry, without his own oath, or the oath of ſome of his counſel, of his appearance in perſon, and like penalty of 40*s.* is impoſed on the attorney for the non-entering his appearance, by filing a warrant of attorney on record.

Hence it is become neceſſary, that the party ſhould appear, at leaſt by an attorney, before the exigent is ſued out, which attorney, being an officer of the court, is reſponſible to the court, that there is a real plaintiff who ſues the outlawry; thus the intent of the *ſtatute* is ſatisfied, and the penalty for the perſon's not appearing in his own perſon being ſo inconſiderable, no one thinks it worth their while to proſecute for it.

This *ſtatute* did not yet remedy all the inconveniences on the proceedings to outlawries, and therefore the 6 *H.* 8. *c.* 4. ſays, * That no man ſhall be outlawed before he is proclaimed in the county where he lives, or did laſt live; and by 31 *Eliz. c.* 3. the ſheriff is to make three proclamations; the firſt in full county, the ſecond at the ſeſſions, and the third near the church-door where the defendant lives, or at leaſt laſt lived: on this ſtatute there was framed a writ of proclamation. *Theſ. brevium*, 173. This writ is additional to the *exactus* in the *exigent*; if he appears before the return of the *exigent*, he may ſue out a * Page 19.

ſuperſedeas, which he procures from the exigenter; but this appearance muſt be firſt recorded of that term in which the *exigent* iſſues; and this is allowed, becauſe there is a day given him by the writ to come in, and his neglect of not appearing is ſo very penal, that they give him leave at any time to appear before the outlawry pronounced and returned; the reaſon of his being proclaimed at the county-courts is, that he may ſurrender himſelf; and if he does this, he ſhall not be obliged to put in bail, becauſe he was never in cuſtody; but if he comes in on the *capias utlagatum*, where there is any debt mentioned in the original, there he muſt put in bail to the debt, becauſe being in cuſtody he ſhall not be diſcharged without caution; but where there is no debt mentioned, his caution cannot be adjudged, there being no *quantum* of
* Page 20. the plaintiff's * demand on the record, and ſo they take common bail only; but if he comes in before the exigent is returnable, there he ſhall give no bail, though the original ſpecifies the debt.

CHAP. III.

Of Bail.

HAVING thus conſidered the ſteps taken againſt the defendant, when he neither appears on the ſummons nor can be taken on the *capias*, we will now conſider him as he is taken up by the proceſs.

If the party be taken, he either gives bail, or not.

If he gives bail, the party is at liberty to take an aſſignment of the bail bond, or to amerce the ſheriff for not bringing in the body; if he does not

not take bail above, or the plaintiff declaring againſt him as in cuſtody.

Firſt, When bail is taken, and the plaintiff ſo takes the aſſignment of the bail-bond. When the ſheriff arreſts any one, he is obliged to take bail, which is by the 23 *H.* 6. *c.* 9. † otherwiſe an action lies againſt him; formerly, before the *ſtatute*, he was not obliged to take bail, unleſs the defendant ſued out a writ of *mainprize*, * becauſe the writ commanded him to take him, but he might take bail of his own head; and if he had not the body ready according to his return, he was amerced; as he now is, if the plaintiff does not take an aſſignment; but if he does, he is not amerceable, for the plaintiff has waved the benefit of the amerciament by accepting the bond the ſheriff took according to the ſtatute: but before the ſtatute for the amendment of the law, he was to have ſued in the ſheriff's name; and if the ſheriff had releaſed the action, his remedy was in a court of equity; but by the ſtatute of the amendment of the law the intereſt of ſuch bond paſſes by the aſſignment to the plaintiff, and he may ſue it in his own name.

* Page 21.

Secondly, He may have him brought up; this is uſually done, when the plaintiff diſlikes the ſecurity the ſheriff has taken; and the ſheriff having returned a *cepi corpus*, it is a breach of duty in him not to bring him in according to his return, for which the court amerces him, as one of their officers who had been diſobedient to their writ which is returned and filed; the court amerces

† This ſtatute authoriſes indeed the ſheriff to let out of priſon all manner of perſons by him arreſted, or being in his cuſtody, by force of any writ, bill, or warrant in an action perſonal upon reaſonable ſureties of ſufficient perſons; but it muſt not be underſtood that the ſheriff hath any power given him by this ſtatute to *arreſt* any perſon in a perſonal action before ſuch perſon ſhall have been duly ſummoned, attached by his goods or chattels, and diſtrained, or before the damages on which the plaintiff grounds his action ſhall have been aſcertained by auditors aſſigned, or by writ of enquiry.

him, becauſe it appears on record he has diſobeyed the king's writ; but if the writ be not returned, and they make an order that the ſheriff ſhall return his writ in four days, as is uſual, where the diſobedience is to be pronounced by order * of the court, and conſequently a contempt of the court as a court, for which an attachment lies.

* Page 22.

But if it be in another term, then there muſt be an *habeas corpus* upon a *cepi* returned, becauſe the ſheriff might be prepared to have him according to his writ the firſt term; but not being required to have him in court the ſecond term, an *habeas corpus* is neceſſary, and the ſheriff in this writ muſt return the body, or a *languidus*, or a *mortuus*, or elſe he will be amerced.

If the ſheriff returned a *cepi*, and *paratum habeo* on a † *meſne proceſs*, he ſhall not be amerced if he does not bring in the body, though he ſhall be amerced if he does not return his writ; and the reaſon is becauſe the ſheriff is bound to bail the party by the 23 *H.* 6. and therefore if the ſheriff be miſtaken in his ſureties, he ought not to ſuffer in his liberty, and the returning his writ is in his own power; but it may not be in his power to bring in the body which he was obliged to bail. If the ſheriff returned a *cepi corpus*, and *paratum habeo*, or *languidus*, where the defendant is at large without any bail taken, he is not aided by 23 *H.* 6. but an action for a falſe return lies againſt him, but no action lies on ſuch returns, though falſe, when he has taken ſecurity; becauſe he is obliged by the ſtatute to take bail of him.

† See Page 24.

1 Rol. 807. 8. Cro. El. 824, 852.

Noy 391. 1 Rol. Abr. 807.

* If a *capias* iſſues to a ſheriff, and he arreſt the defendant on a † *meſne proceſs*, and he take the body, and the defendant be reſcued by *J. S.* he may return the reſcue, and ſuch return is good, and no action of eſcape lies againſt him after ſuch return; but the court will iſſue proceſs againſt ſuch reſcuer, or fine him: but on a *capias ad ſatisfaciendum*,

* Page 23. Bulſt. 200. Moor 852. Jon. 207. Cro. Jac. 419. 1 Rol. Rep. 338, 440. Cro. Eliz. 868. 3 Lev. 46. Dalt. Sher. 165, 216, 117.

† See Page 24.

dum, ſuch return is not good, and an action for an eſcape will lie.

The reaſon is, that antiently every man being in *decenna* had bail, and now is preſumed to have bail ready to be anſwerable for his forth-coming, and therefore the ſheriff is not obliged in duty to take the *poſſe comitatus* to aſſiſt him; but when judgment is paſſed, and his bail do not ſurrender him, nor pay the condemnation money, then a *capias* iſſues, to which there can be no bail, and there it is preſumed that he will not be forth-coming, becauſe neither he nor his bail have ſatisfied the judgment; and therefore the ſheriff then ought to take the *poſſe comitatus*, and conſequently it cannot be a good return that he took the body, but that it was reſcued; and the party may have an action of eſcape againſt the ſheriff on this return, or a new *capias* for the return of an ineffectual execution; but if the ſheriff had permitted him to go at large, he could have had no new execution, for an * effectual execution is returned, and ſo there is a pledge for ſatisfaction in the cuſtody of the ſheriff, for which he is only anſwerable. 1 Ro. 904. Cro. Car. 240. 255. * Page 24.

Antiently they had caſtles, fortreſſes, and liberties, whereby they reſiſted the ſheriff in executing the king's writs, which creating great inconvenience, the ſtatute *Weſtm.* 2. *c.* 39. hindered the ſheriff from returning reſcues to the king's writs of execution, the words are, *Multoties etiam falſum dant reſponſum mandato, quod non potuerunt exequi præceptum regis propter reſiſtentiam poteſtatis alicujus magnatis, de quo caveat vic' de cætero, quia hujuſmodi reſponſio multum redundat in dedecus domini regis & coronæ ſuæ, & quam cito ſub-ballivi ſui teſtificentur, quod invenerunt hujuſmodi reſiſtentiam, ſtatim (omnibus omiſſis) aſſumpto ſecum poſſe comitat' ſui eat in propria perſona ſua ad faciendum executionem, & ſi inveniat ſuos ſub-ballivos veraces caſtigat reſiſtentes per priſonam,* 8 Co. 142.

priſonam, a qua non deliberentur, ſine ſpeciali præcepto domini regis.

The judges conſtrued theſe words to extend only to executions, and not to writs on *meſne proceſs*; † and that the ſheriffs were not obliged to carry the *poſſe comitatus*, where the man was bailable, for they did not preſume that in ſuch caſes the king's writ would be diſobeyed.

¶ Page 25. * The *original* of commitment for ‡ contempt ſeems to be derived from this ſtatute; for ſince the ſheriff was to impriſon thoſe that reſiſted the proceſs, the judges that awarded ſuch proceſs muſt have the ſame authority to vindicate it; hence if any one offers any contempt to the proceſs, either by word or deed, he is ſubject to commitment during pleaſure, *viz. a qua non deliberentur ſine ſpeciali præcepto domini regis*; ſo that notwithſtanding the ſtatute of *mag. char.* that none are to be impriſoned, *niſi per legale judicium parium ſuorum vel per legem terræ*, this is one part of the law of the land to commit for contempts and confirmed by this ſtatute.

Mag. chart. cap. 29.

There

† Becauſe writs on *meſne proceſs* as here underſtood, were not then known: It is true there was a meſne-writ, but this writ ſhould only operate where there was a ſuperior lord, and a meſne-lord. The *meſne* proceſs ſpoken of in this place, and alſo in pages 22 and 23 may confound ideas and gives this modern proceſs a colourable ſanction of antient uſage: for the real writ of meſne, was a writ of execution, it was ſued out *after* and not *before* Judgment, ſee 13 *Ed.* I. *e*, 45. *Eodem modo mandetur ordinario in ſuo caſu obſervato nihilominus quod ſupradictum eſt* de medio (meſne) *qui per recognitionum aut* judicium *obligatus eſt ad acquietandum*

‡ The *contempt*, here mentioned is a general term, and in our Saxon laws is very properly called "Oreþyſſene which is as much as to ſay ſuch a perſon hath ſet himſelf "over his highneſs." This offence was deemed a great breach of the King's peace however, great as it was, it ſtill was an *emendable* offence, and did not ſuperinduce any commitment to priſon. In the laws of *Henry* I. it is deſcribed to be "*Infractio pacis regiæ per placitum brevium vel præceptorum ejus* contemptorum, *et hoc placitum mittit omnes in miſericordia regis, ſecundum quantitatem delicti.* But the fine incurred, was *certain*, ſo that it could not

be

There likewiſe is in this ſtatute a return of the ſheriff, *mandavi ballivo talis libertatis, qui nullum dedit mihi reſponſum*, which is a good return, if the bailiff has the return of writs. Theſe liberties began in the *Saxon* times, and were grants from the crown to lords, of juriſdictions within themſelves, ſuch as *infangthef* and *outfangthef*; the firſt of which was a power of life and death over their own tenants, that had commited the felony; the other a power over any perſon accuſed of felony within their manor.

Vide Cowel's interpreter verb. infangthef and outfangthef.

Theſe private juriſdictions were retrenched after the conqueſt as much as poſſible becauſe they

be exceeded, and on payment of it (that it is, by diſtreſs of goods and chattels) the *contemptor* could not be attached by his body, and *a multo fortiori*, could not be committed to priſon during the king's pleaſure either by the ſheriff, or by the court, *nomine contemptus*. We muſt therefore look for ſome other ground or common-law principle which authoriſes this commitment to priſon during the king's pleaſure. Now it is well known that at common-law properly ſo called (that is to ſay, the laws of *Edward* the confeſſor, confirmed and enlarged by *William* the conqueror (there were only *five* crimes that were not emendable, or as they are emphatically called in king *Canute's* laws "bocleap" *i. e* bought-leſs or not to be bought off: one of theſe five crimes is 'æbepe mopðen' or "appearant murther" that is to ſay, murther ſo notoriouſly apparent, that it cannot be denied or contradicted. Perſons apprehended in the act of ſuch murther were immediately committed to priſon and obliged to adjure the realm within 40 days, but in the interim the King *legefuæ dignitatis* might grant a pardon of life and limb, which though it were granted, yet the murtherers *ſecundum legem terræ nullatenus in patria remanebunt.*" So that all that is meant in this ſtatute by the words "*Puniantur ſecundum quod domino regi placuerit*," is that the king may pardon them, their lives and limbs, if he ſo pleaſes, any time within 40 days after their commitment to priſon. Now ſeeing that it is impoſſible in ſuch a reſiſtance which required the *whole militia* of the county to quell it (for that is the true meaning of the *poſſe comitatus*) that there ſhould not be ſome one or other of the King's ſubjects killed, ſeeing that, and as ſuch killing would be *murther* at common law, we are enabled to find the true ground and principle on which the reſiſters, their aiders, conſenters, commanders, and fautors of ſuch are by this ſtatute committable to priſon namely for *apparent-murther*, and not for *contempt* as the chief-baron hath ſuggeſted: according to this explanation the reſiſters, &c. &c. are impriſoned *ſecundum* legem terræ, and the ſtatute itſelf does not infringe magna charta, which I apprehend cannot conſtitutionally be ſaid of *commitment for contempt* merely *ex officio*

* Page 26. they would have been very inconvenient * to the *Normans*; but in recompence thereof, all eſcheats for felony were allowed the lord of the manor, as if he had exerciſed ſuch juriſdiction: but after the conqueſt, the lords fell into a new method; for, to maintain their authority within their neighbourhoods, they purchaſed the bailiwicks of the hundreds, ſometimes for years, for life, in fee, at a certain rate in fee-farm, and for this they had the court-leet, the aſſizes of bread and beer, and the amerciaments, (*viz.*) the fines for the breach of any of the articles properly examinable in the leet; and they likewiſe had the return of the writs; ſo that the lord appointed his bailiff to execute the king's writs within his franchiſe, and the ſheriff, who is the ordinary bailiff of the crown, could not enter the ſame, which was a great obſtruction to the publick juſtice; to remedy this, *Weſtm.* 2. *cap.* 29. enacts that if ſuch bailiffs gave no anſwer to the ſheriff; the court ſhould grant a ſpecial warrant with a *non omittas*, which authoriſed the ſheriff to enter the franchiſe; by which it appears, that the king's bailiff was to anſwer the ſum due from the franchiſe, yet they were bailiffs to the ſheriff to anſwer the king's proceſs ſent from him to them. Theſe liberties being erected by grant from the crown, unleſs they have

* Page 27. been allowed in *Eyre*, when ſuch grants * have been ſhewn, they cannot be preſcribed for: it is true † the *non omittas* is mentioned by *Bracton* and

† The "*Non omittas*" is grounded on the 19th chapter of the common law, where it is declared that "*Barones qui ſuam habent curiam de ſuis hominibus, videant ut ſic de eis agant, quatenus erga regem non offendant:*" conformable to this law is the 24 *cap.* of *H.* firſt "SUPER *barones ſocham ſuam habentes habet judex fiſcalis juſticiæ legis obſervant, & quicquid peccabitur coram perſonam.*" And *Britton*, ſpeaking in the perſon of the King, ſays, "*nous voulons que notre juriſdiction ſoit* ſur *toutes les juriſdictions en notre royaume.*"

and *Fleta*, which makes lord *Coke* ſuppoſe it was at common law; but it is to be obſerved that there were ſyſtems of law, which like *Britton* and *Glanville* were publiſhed by *Edward* the firſt, and compoſed of ſuch cuſtoms as had been uſed, and likewiſe of ſuch laws as he intended; but thoſe of them that related to *baronage* were generally enacted by the firſt ſtatutes made by their conſent; therefore after this ſtatute, if the ſheriff entered into the franchiſe without a *non omittas*, he was ſubject to an action, but the execution was good, becauſe he had an authority to levy the money on the goods, where-ever they were found within the county; for erecting the franchiſe did not exclude it from the king's proceſs ſent to the ſheriff of that county; but the fee-farms being payable to the king, if they were not paid in by the bailiffs at the Exchequer, proceſs went out to levy them, which would have been improper, if ſuch franchiſe had been exempt from the county: hence the notion came, that the king's proceſs was a † *non omittas* of courſe, becauſe the king was to levy his fee-farm from the bailiwick, and in the writs at the ſuit of a common perſon it is good, the ſheriff being liable to an action, which is on the rule, *quod fieri non debet ſed* * *factum valet*; the money is well levied, though the ſheriff is ſubject to make the lord amends for entering his liberty: but when there is a *non omittas propter aliquam libertatem*, there, by this ſtatute, he is to enter the franchiſe; ſo by *Weſtm.* 1. *cap.* 17. where he is to make deliverance by replevin, he is to enter; ſo where he is judge, as

Plow. 216, 245. 33 Aſſ. 19. 41 Aſſ. 17.

F. N. B. 95. 20 H. 7. 7. Finch 57. 43 E. 3. 3c. 11 H. 4. 9. Dalton's Sher. 46. 11 H. 6. 54.

* Page 28.

Br. Offic. 34. Br. Ret. 26. 2 H. 4. 1.

† The "*non omittas*" is not iſſuable where the bailiff hath in due time returned the writs to him directed, or hath paid the king's money into the exchequer: and the *factum valet, quod fieri non debet*, approaches too near the *Cæſarian code* to be admitted for law in any court of this country

41 Aſſ. 17. 33 Aſſ. 19. Br. ret. 78.

as by a writ of *redisſeiſin*, he ſhall enter the franchiſe; becauſe the judicial power lodged in him by the ſtatute cannot be transferred by him to the bailiffs. In waſte the ſheriff has authority by the ſtatute to enter the franchiſe; ſo he may enter upon a warrant for breach of the peace, for this is at the king's ſuit, and therefore a *non omittas*; and therefore it cannot be ſuppoſed that the king would be debarred of having his own proceſs executed in any place; and therefore in the king's caſe, if the ſheriff does not enter the liberty, but returns *mandavi ballivo*, he is amerciable: when the bailiff is party, the ſheriff is to do all acts; for the intention of the liberty is for ſtrangers, and not to make lord or bailiff judge in their own court.

Fitz. Chart. 2. 1 Ed. 3. 56. 7 Aſſ. 11.

5 Co. 92.

1 H. 4. 9. Br. Office. 35. Dalt. Sher. 464.

The bailiff of the franchiſe cannot enter into the guildable, and if he does it is erroneous, becauſe he has no authority out of the franchiſe, more than the ſheriff has in another county.

* Page 29. 5 Co. 92. Office. Br. 135. Theſ. br. 166.

* In *Semaine's* caſe, it is ſaid, that if there be two liberties within a county, (*viz. St. Edmund de Bury* and *Etheldred de Ely in Suffolk*, and a *capias* be directed to the ſheriff to take the body of *B.* and the ſheriff returns that he has made his mandate to the bailiff of *St. Ethelred*, who has made no anſwer; in this caſe the ſheriff on a *non omittas* ſhall enter into the liberty of *Bury*, though the bailiff of that liberty has made no default; but this is to be underſtood of the proceſs of the King's Bench; for the Common Pleas recites the *capias*, the ſheriff's return, that he has made his mandate to the bailiff, who has given no anſwer, and then gives the ſheriff power to enter the liberty; but in the King's Bench on the ſheriff's return on the *latitat*, the authority is general, *non omittas propter aliquam libertatem*, which gives the ſheriff power to enter not only that liberty, but all the liberties within the county: and this ſeems to be grounded on the words of the *latitat*, (*viz.*)

(*viz.*) *latitat* and *diſcurrit*, ſo that the defendant is *ſuppoſed* to ſkulk and run from one place to another; and therefore the *non omittas* was made general, that he might not run from one liberty to another. As theſe bailiffs of franchiſes were bailiffs to their lords by particular grant from the crown, the ſheriff could not enter to make execution, without ſpecial authority given * by the ſtatute, as we have already ſaid; therefore the ſheriffs were not anſwerable for the bailiffs falſe returns, who did not belong to them, but to the lords of the franchiſes, for ſuch return is made by the lord's bailiff, and not by the ſheriff's bailiff. * Page 80.

But if the bailiff of the franchiſe had made an inſufficient return, and the ſheriff returned that to the court, they formerly held the ſheriff was anſwerable, and not the bailiff, for an inſufficient return is no return, and the bailiff making no return, the ſheriff ought to have ſaid that the bailiff *nullum dedit reſponſum*; but this is altered by 27 *H.* 8. *c.* 14. which ſays, that the amerciaments for inſufficient returns made by bailiffs of franchiſes ſhall be ſet on the bailiff's head, and not on the ſheriffs; ſo that it ſeems, that after an amerciament for an inſufficient return, which we have already ſaid to be none, the court will award a *non omittas*. 3 H. 7. 12. 5 H. 7. 27. Br. ret. 89.

But if there be a perpetual bailiff by charter within the guildable, he is ſtill bailiff to the ſheriff, and not to any lord of a franchiſe: and therefore the ſheriff not being to enter a franchiſe he cannot return *mandavi ballivo*; and if he could, there could not be a *non omittas* upon it, becauſe there is no liberty to be entered; and therefore if ſuch bailiff within the guildable does * not execute ſuch writ, and give the ſheriff a ſatisfactory anſwer, he may execute the writ by his own bailiff; for he is intirely reſponſible to the court for the execution of the proceſs: where the return relates to things permanent, the ſheriff muſt return *mandavi ballivo* to the firſt proceſs; for if he makes any other Bro. ret. br. 69. * Page 31.

Bro. ret. br. 29. Bro. Jud. 133. other return to ſuch proceſs, ſuch return concludes of courſe that the execution of the writ was in his power, and that the permanent thing in execution to be done was within the guildable, and he cannot contradict ſuch return, by any ſubſequent return to another writ.

Thus in *alias ſummons* in dower the ſheriff cannot return *mandavi ballivo*, for he ought to have made this return upon the firſt writ, that ſo the court might have awarded a *non omittas*; but if it relates to matters tranſitory, then the ſheriff may return *mandavi ballivo* on the ſecond proceſs, as on an *alias capias*, for the body might be in the liberty on the iſſuing the ſecond proceſs, though it was in the guildable in the firſt; and therefore the return of the firſt proceſs does not conclude him from returning the liberty to the ſecond proceſs.

Br. ret. br. 99. 14, 8, 4, 1. If the bailiff of the liberty dies after he has returned *cepi*, a *diſtringas* iſſues againſt his ſucceſſor, becauſe he takes it up under the return of his predeceſſor.

* Page 32. * *Note*; It is now uſual to take out the [*capias* and *non omittas* together,] without ſtaying for the ſheriff's return.

We come now in the *ſecond* place to conſider the defendant's appearing and putting in bail above, or the plaintiff's declaring againſt him in cuſtody.

The appearance of the plaintiff and defendant *in propria perſona* at the return of the writ is recorded by the Filazer, becauſe he was to continue the proceſs of the court, till the prothonotary took it up on the declaration; this prothonotary ſets forth the authority by which the court proceeded, that it might appear the court had conuzance of the cauſe, and that they purſued their warrant; and therefore in all actions, where the firſt proceſs is by ſummons, tho' he did not

not appear at the return of the ſummons, and they had iſſued ſeveral meſne writs, yet they only took notice of the ſummons, and ſaid *ſummonitus fuit ad reſpond'*, and ſo in treſpaſs *attachiatus fuit ad reſpond'*. being ſufficient to ſhew their authority.

Before the ſtat. of *Weſtminſter* 2. *cap.* 10. all attornies were made by letters patent under the broad ſeal, commanding the juſtices to admit the perſon to be his attorney; theſe patents, where they were obtained, ſeemed to have been inrolled by a proper officer, called the clerk of the * warrants, and alſo the courts inrolled theſe patents on which any proceedings were. If ſuch letters patents could not be obtained, the perſons were obliged to appear each day in court, in their proper perſons. * Page 33.

This *ſtatute* gives to all perſons a liberty of appearing, and appointing an attorney, as if they had letters patent; and therefore the clerk of the warrants received each perſon's warrant, and upon the warrant it equally appeared to the court, that he had appointed ſuch a one his attorney, to the end of the cauſe, unleſs revoked; ſo that on each act there is no occaſion of the plaintiff's and defendant's preſence, as was uſed before that time; this authority continues till judgment, and for a year and a day, and afterwards to ſue out execution, and for a longer time, if they continue execution; but if not, the judgment is ſuppoſed to be ſatisfied; and to make it appear otherwiſe, the plaintiff muſt again come into court, which he either does by a *ſcire fac'* or an action of debt on the judgement. 2 Inſt. 378.

† The giving bail came in on returning the *capias*, for before that time this manner of proceeding

† The origin of this practice, and the countenance given it by the Lord Keeper *Finch* and Sir *Francis North*, Lord Chief-Juſtice of the *Common Pleas*, may be read at large in the life of Lord *Guilford*.

ceeding was not known in a perſonal action; for in theſe, if he did not appear on the ſummons, the proceſs was an attachment; and the ſheriff might attach him either by his goods or by pledges; if he * attached him by his goods, it was to appear in the king's court, where upon his non-appearance they were forfeited; if by pledges, and the party did not appear, the pledges were amerced, becauſe they undertook to the officers of the court, and the making that default was ſuch a miſdemeanour, for which an amerciament was the puniſhment, as fines were for greater offences.

* Page 34.

Booth, 9, 10.

In the civil law there were always cautions put in by *pignora*, or *fide juſſores*, and the *idoneus fide juſſor* was *ex arbitrio judicis approbatus, vel litigantium conſenſu acceptus. Pere in cod.* 101. digeſt. lib. 2. Tit. 8. *qui ſatiſdare cogantur. Corvinus* 54. *& in de ſatis dacionibus* 839.

In our law, where a man came in cuſtody on the *capias*, it being on meſne proceſs, he was to give caution, and the bail was *de fide juſſore*, or keeper, to whoſe cuſtody he was committed.

Q. Noy.

But they did not require any caution where the debt was not 20*l.* or above, becauſe there could not properly be any *fide juſſor idoneus*, where the ſum was ſmaller; becauſe the only way of eſtabliſhing ſuch caution is by oath; and to give a man his oath that he was worth a ſmall ſum, did not give a proper caution to the plaintiff, and would therefore have been wholly inſignificant, * and conſequently would not have been worth the trouble and expence in putting in ſuch ſecurity; and therefore for ſuch inconſiderable ſums no bail was required, but an appearance only.

* Page 35.

The old rule in the *Compleat Attorney*, printed in 1676, *fo.* 45, is, that if the defendant be arreſted by meſne proceſs, as *capias*, *alias*, or *pluries*, and the plaintiff holdeth him not ſufficient to pay the debt or damages contained in the writ, the ſame amounting

amounting to 20*l.* or upwards; in this caſe the plaintiff upon the return of the writ, by entering a *ne recipiatur* with the filazer out of whoſe office the *capias* did iſſue, may crave ſpecial bail to be put in to his action, which the defendant muſt put in before ſome judge of the court where the cauſe depends, who will accept of ſuch bail, as the validity or weight of the cauſe doth require, or in his diſcretion ſhall be thought fit.

This rule was taken from the *King's Bench*, where antiently, if it were under 20*l.* they let the perſon out of actual cuſtody upon common bail; but if it were above 20*l.* they made him find ſpecial bail before he could be let looſe from the cuſtody of the marſhal.

From hence the *common pleas* made a rule upon their attornies as officers of the * court, that a *ne recipiatur* might be entered with the filazer where the debt was above 20*l.* and then the attorney was not to appear till after bail put in, for the meaning of the *ne recipiatur* rule was, that no appearance ſhould be received till after bail was filed with the judge, ſo that it was irregular to file the warrant of attorney before bail filed. * Page 36.

When the *King's Bench* came to require ſpecial bail where the debt was above 10*l.* the *Common Pleas* ſunk the rule to any ſum above 10*l.* and ſo required ſpecial bail; this was in the time of my lord *Ch. J. Worth.*

In an attachment of privilege, which is a *capias* in the firſt proceſs, they held to bail for any ſum, though ever ſo ſmall; for an attachment of privilege being a *capias* in the firſt proceſs without a ſummons, does not ariſe from a ſuppoſition of a *nihil* returned, and that there are no iſſues to anſwer the debt, but this proceſs ariſes from a debt due to the officers of the court, by the acts of the court, and therefore another officer ought not to appear, without ſeeing a ſecurity given for ſuch debt; and therefore they hold the defend-

ant

ant to bail in this caſe, though the debt be ever ſo ſmall; ſo no need of a *ne recipiatur*.

When the action is only for damages, there
* Page 37. the party is not held to bail, unleſs in * *Mayhem*, or ſome notorious battery; and the reaſon is, there is no certain ſum for which the caution can be aſcertained; but in *Mayhem*, and where by the injury it is apparent that the damages will exceed the ſum of 10*l*. there the judge may by ſpecial rule hold to bail.

On a penal *ſtatute* the defendant is not held to bail, becauſe the penalty on a *ſtatute* is in the nature of a fine or amerciament ſet on the party for an offence committed, and therefore no perſon ought to ſuffer any inconvenience by reaſon of ſuch law, till he is convicted of ſuch offence; for then the defendant would ſuffer an action of a penalty before it ought to be ſet.

1 Salk. 98. An executor or adminiſtrator ſhall not be held to ſpecial bail, becauſe the demand is not on the perſon, but *in rem*, (viz.) the † aſſets of the dead, unleſs there be a *devaſtavit* ſuggeſted. And if an *habeas corpus* be returned into any of the courts above, though the ſum be under 10*l*. they will hold him to bail, that ſo the plaintiff may not be in a worſe condition than he was below, where the defendant was held to bail; but in caſe of an executor or adminiſtrator, or heir, no bail is required, even on a *habeas corpus*, for they ought not to have been held to bail below, the debt not being their own: the reaſon why the defendants
* Page 38. in * all caſes are obliged to put in bail is, that their juriſdictions being confined, they cannot follow the debtor out of their juriſdiction; therefore they have always (in the leaſt pledges) put in bail that live within their own precincts; and, were it otherwiſe, it would be improper to give

† *Aſſets* is a corruption of the French word "*aſſez*."

give caution, and therefore it becomes here neceſſary that bail ſhould be given in all caſes.

The act of 4 *W. & M. c.* 4. gives power to the judges in each court, whereof the chief to be one, to appoint commiſſioners to take recognizances of ſpecial bail in ſuits depending before them, which recognizances are to be tranſmitted to them; and upon affidavit of the true taking them, ſuch recognizances ſhall be as effectual as if they were taken before themſelves.

The cognizors, unleſs they live in *London* or *Weſtminſter*, or within ten miles, may juſtify before the commiſſioners in the country; this ſtatute was to prevent the inconveniency that was at common law, for before that time the bail was taken *de bene eſſe* before the judge; and if they were not excepted againſt in twenty days time, then ſuch bail ſtood; which was the ſame notice given to the plaintiff to except to the bail, and inquire after the bail in the country, as the defendant had to appear to the writ; for from the *teſte* of each writ to * the appearance-day are twenty days in the *Common Pleas*; the bail-piece is left with the filazer until after the twenty days are expired, and then it is filed in court; in the *King's Bench* it is left with the judge, becauſe the judges determine all things relating to the priſoners in their own court, who are not to be delivered out of court without their authority.

* Page 39.

The commiſſioners are to take bail, but are obliged by rule of court to keep a book, wherein are entered the names of the plaintiff and defendant, and bail, and the perſon who tranſmits the ſame, and who makes affidavit that the recognizance was duly acknowledged in his preſence; and on ſuch affidavit the judges make a conditional *allocatur*, and the bail are to ſtand abſolute, unleſs the plaintiff except againſt them within twenty days; and if he except, the bail may juſtify by affidavit taken before the commiſſioners in the country.

* Page 40.

*CHAP. IV.

Of the Declarations and Dilatory Pleas.

Stat. 8 Eliz. cap. 2.

BY the practice of the *King's Bench*, if the defendant appeared perſonally at the return of the writ, the plaintiff was to declare within three days; and is ſtill to declare, within ſix days, in the *Exchequer:* If he appeared by attorney he was to declare before the end of the term, and he is ſtill to declare before the ſeal in the *Exchequer*.

This was plainly the ancient practice, becauſe there is no continuance from the appearance-day to the time of declaring, there being no precedent of *libertas narrandi*, therefore the declaration muſt be of the ſame term.

But in the *King's Bench*, when a defendant comes in on a criminal proceſs, which is ſuppoſed to iſſue on a complaint to, and by examination of the chief Juſtice, the defendant is not diſcharged till the ſecond term after his appearance, for in the firſt term all parties concerned might not poſſibly have notice.

When a man comes in on a criminal proceſs, * Page 41. he had liberty to traverſe in *prox.* * on all bailable offences, becauſe he might not be prepared for trial with his witneſſes; but it was otherwiſe in capital caſes, becauſe there was oath of the crime, and witneſſes examined thereto before commitment, ſo that if there was a preſentment of a treſpaſs and *ignoramus* found, he was not to be diſcharged by proclamation till after the ſecond ſeſſions, that they might ſee if any other came in againſt him or not.

This begot the rules on the civil ſide, that there ſhould be two terms after his appearance before the plaintiff ſhould be *non-proſs'd*, becauſe the

the defendant was bound to attend during the two terms, to ſee if the perſon, who originally proſecuted the treſpaſs, would put in an indictment againſt him; and being obliged to attend two terms on the criminal ſide before he could be diſcharged and proclaimed, and having likewiſe appointed an attorney at the plaintiff's ſuit, he was obliged to accept a declaration within that time.

But when the defendant appeared, the parties antiently might obtain by conſent a day before declaration, which was called *dies datus prece partium*; for the conſent of the defendant exempted the plaintiff from the neceſſity of declaring immediately: but in that caſe, if the defendant did not appear at the day given, ſince there was no * declaration, the plaintiff could not have judgment; but was obliged to bring the defendant in again by proceſs, that he might declare againſt him in preſence; for none can have judgment *but upon complaint exhibited to the court againſt the defendant whilſt in court*; but after the declaration is filed, if the defendant make default, judgment ſhall be given againſt him; becauſe, having deſerted the court, he ceaſed to oppoſe the plaintiff's demands, and ſo ſubmitted that judgment ſhould be given againſt him.

* Page 42.

When the defendant appeared, the plaintiff was obliged to declare on the return of the writ, and the defendant was obliged to plead, unleſs he obtained leave from the court to imparle till the next term, which was never granted without good cauſe, as when the defendant could not plead without the ſight of writings left in the country, or the like.

This *libertas interloquendi* ſeems to ariſe from a notion of religion, which is mentioned in St. *Matthew, ch. 5. v. 25. Agree with thine adverſary quickly, whilſt thou art in the way with him:* they looked upon the plaintiff, at the time of declar-

ing, to be in his way towards judgment; and that therefore, ſince the defendant was ordered by the precepts of religion to agree with him, that there was a neceſſity to give time for that * purpoſe; and therefore *libertas interloquendi* was entered upon the roll when the writ was general, becauſe the defendant did not know how to agree with the plaintiff till he had heard the full demand of the plaintiff; and therefore then the defendant might have agreed with him in the country, whilſt he was in the way, according to the letter of the text, in which caſe there was no need of a *libertas loquendi* to be entered upon the roll.

* Page 43.

In the *King's Bench* they imparled of courſe, becauſe they came in on a proceſs, in which the cauſe of action is not mentioned, becauſe the defendant's *proportion* was from the plaintiff's declaration: and ſo in *acetiams* in the *Common Pleas*; for the *King's Bench* giving them leave to traverſe on the criminal ſide, when he was alſo charged on the civil ſide, they likewiſe gave him leave to imparle; but in ſpecial originals, returnable in an iſſuable term, they will not give the defendant leave to imparle, becauſe thereby he will put off the trial; but the general practice was to bring their original returnable in a term not iſſuable, and then the plaintiff declared, and the defendant eaſily obtained an imparlance, and then the *narr'* was entered on an imparlance roll † by the prothonotary, being all that was done the firſt term by the court, * and this was the firſt act of the court after the appearance of both parties; but in the *King's Bench* the bill was filed by the maſter of the office againſt the perſons privileged, *viz.* the officers and priſoners of the court; and this file the priſoners and officers were obliged to take notice of. [Since (by new rules) they are obliged to deliver copies to the gaoler when the defendant is in actual cuſtody.] This practice in the *King's Bench*

† So called from the award of imparlance.

* Page 44.

Bench created that in the *Common Pleas*; they declared *ore tenus*, which was only minuted by the prothonotary, and likewiſe the prayer or permiſſion to imparle, or the plea; now in conformity to the *King's Bench* they entered a. *narr'* on a roll, which was called the imparlance roll; and to make up this roll, as the bill in the *King's Bench*, the attorney delivered in paper the within declaration and copies of them; the bill in *B. R.* and imparlance roll in the *Common Pleas* were given to the defendant's attorney; but the bill in the *King's Bench* ſupplied the place both of the original and imparlance roll.

The prothonotary has two for every court, becauſe he is ſuppoſed to enter them on the imparlance; but in the *King's Bench* the plaintiff's attorney brings his bill ready ingroſſed on parchment, and pays nothing filing, if brought in within the term in * which the proceſs is returnable; but if afterwards 4*d.* but the defendant in both courts pays for the copy of the plaintiff's declaration at 4*d. per* ſheet for the whole iſſue; for the plaintiff's attorney is ſuppoſed to ſuperintend the entry of them. * Page 45.

This bill in the *King's Bench*, and a copy of the declaration in the *Common Pleas*, tho' it be in paper in the *Common Pleas*, and in the *King's Bench* be only a declaration left in the office, yet it regulates the whole proceeding in the iſſue; for from thoſe pleadings in paper or in the office, the *niſi prius* roll is made up, and after the verdict they make up the plea roll from the *niſi prius* roll, and enter the judgment thereon which is indeed inverting the antient proceedings; for antiently they uſed to make out the imparlance roll, and then afterwards, when *a plea was given to enter*, they uſed to make up a plea roll; and from thence they uſed to tranſcribe the *niſi prius* roll, and upon the back of the *niſi prius* roll the verdict was entered, which they uſed to tranſcribe upon the Vid. Rules.

the plea roll, and thereon judgement was entered; and the reaſon why the paper book came in inſtead of the rolls of the court, is this, becauſe the buſineſs increaſed in the *Common Pleas*, and it was not poſſible for the prothonotary to enter them upon the roll; and therefore they permitted * the attornies to deliver their pleadings in paper one to the other; and in the *King's Bench* they were permitted to file them up with the prothonotary, and afterwards they delivered them up to the other in paper only. Hence it is that thoſe paper proceedings, are looked upon as the original materials to ſettle the *niſi prius* roll; if the materials vary in the iſſue from the paper proceedings, the verdict will be ſet aſide, but they will not let them move in arreſt of judgment, till the plea-roll is made up, and the verdict there entered of record; but they may move for a new trial before ſuch plea-roll is made up.

For the ſame reaſon no imparlance roll.

* Page 46.

The *prothonotaries* were ſcribes, who took the acts of the court, and had the ſame name in the courts of the empire; and in the firſt erection of the court of *Common Pleas*, there being only three judges, each had his prothonotary.

2 Dufren. 153. Cronica ſeries 30. Idem 32.

† The chief juſtice of the Common Pleas was conſtituted 29 *E.* 1.

William the Conqueror, to make the *Norman* tongue current, ordained that the pleadings in the courts of juſtice ſhould be in *French*, and afterwards they were entered in *Latin*, that being a dead language, and ſubject to no variation; the *French* continued till *Hill.* 36 *Ed.* 3. then by the ſtatute 36 *E.* 3. * *c.* 15. it was aboliſhed; but the pleadings continued to be in *Latin*; but the prothonotary,

† The firſt chief juſtice of the Common Pleas was conſtituted not in the 29 *Ed.* I. but in the 17 *H.* 3. when the King's mandate was directed to *Robert de Lexinton* and to *William* of *York* that they admit *Robert de Ros* chief juſtice, *Robert de Bellchamp* and *Regin de Moyau*, and *Robert de Rokely* judges of the ſame court, *July* 6. 1233.

thonotary, being uſed to make notes in *French*, ſtill continued the old way, it being a language much ſhorter and more expeditious to take notes; of theſe are compoſed the *year-books*.

When the writ was returned, and the parties appeared, the countor read the writ to the court, and then mentioned the time, place, and circumſtance contained in the writ, *&c.* and the particular damage accrued to the plaintiff: all this was afterwards recorded by the prothonotary; the place was neceſſary, to aſcertain from whence the *pares* were to come to try the cauſe; the time was neceſſary, that it might appear the plaintiff had cauſe of action before the ſuit commenced.

The entries of the ordinary proceedings in the *Common Pleas* are not by *memorandums*, as in the *King's Bench* and *Exchequer*; for as the one was deſigned to determine criminal proceedings, and the other the revenue, ſo the proceedings in civil caſes in both theſe courts, not being the original deſign and principle of their eſtabliſhment, theſe proceedings are the by-buſineſs of theſe courts, and entered by way of *memorandums*, and in the caſe of an action of an attorney, which is the by-*buſineſs of this court, the proceedings are entered by a *memorandum*.

* Page 48.

The declaration in cauſes of complaint being particularly ſet forth, they conclude, *& inde producit ſectam*, which was proffering to the court the teſtimony of the witneſſes or followers; and *Fleta* ſays, *Quod nullus liber homo ponatur ad legem, ne ad juramentum per ſimplicem loquelam ſine teſtibus fidelibus ad hoc ductis, ſed ſi ſectam produxerit, hoc eſt teſtimonium hominum legalium, qui contractu inter eos habito interfuerint præſentes, quibus a judice examinatis, ſi concordes invenientur, tum poterit vadiare legem ſuam contra petentem & contra ſectam ſuam prolatum, & ſi duos vel tres teſtes produxerit ad proband', oportet quod defenſio fiat per quatuor vel per ſex, ita quod*

Vid. Fleta 137.

pro

pro quolibet teſte duos producat juratores uſque ad duodecim.

When the defendant wages his law, he ſays, *et hoc paratus eſt verificare contra ipſum quer', & ſect' ſuam per legem ipſius, prout cur' hic conſ. inde faciend', &c.*

But the law wager then ſtood on ſuch unreaſonable terms, that they ſoon altered it; and when a ſolemn contract with witneſſes was produced, theſe witneſſes, which were antiently joined to the jury to verify the contract, could not be over-ruled by a mere oath of the party; but it was to be diſſolved *eo ligamine quo ligatur*; ſo the * law wager was then denied; as likewiſe in caſe where they offered to prove fraud in the defendant; as likewiſe on all actions on the caſe, and when perſons were obliged to give them credit, as an attorney for fees, and a gaoler for meat and drink; and ſo it was left to thoſe caſes only, where there was an original truſt to the defendant's honeſty: but yet the form of the declaration continued, which was in the nature of *an offer to verify by witneſſes the cauſe of complaint*; but againſt an attorney that form was never in uſe, but a petition was made by a *queritur & inde petit remedium*, becauſe the officers before the diviſion, as being privileged perſons, could only be ſued in the *King's Bench*, and after the diviſion each in his own court.

* Page 49.

In order of pleading the defendant pleads,

Firſt, To the juriſdiction of the court.

Secondly, To the perſon of the plaintiff, and afterwards to that of his own perſon.

Thirdly, To the count or declaration.

Fourthly, To the writ.

Fifthly, To the action of the writ.

Sixthly, To the action itſelf, in bar thereof.

Though the defendant, generally ſpeaking, can have but one plea in abatement, yet this is the natural order of pleading, becauſe by this order each ſubſequent plea admits the former;

former; as when he pleads to the * perſon of the plaintiff, he admits the juriſdiction of the court; for it would be nugatory to plead any thing in that court, that has no juriſdiction in the caſe; when he pleads to the count, he allows that the plaintiff is able to come into that court to implead him, and he may there be properly impleaded; but in pleading to the count he does not admit the writ to be good; yet if the count be vicious, the writ is conſequently deſtroyed; for though the writ in itſelf may be good, yet it is not purſued; but in pleading to the writ, he admits the form of the count, becauſe by any objections to the form of the writ, he allows the count to be ſufficient in form; if the writ be good, it is not to any purpoſe to object to the form of ſuch writ, if the form of the count be thereupon inſufficient; but if the count be in ſubſtance variant, the defendant may ſhew it any time in arreſt of judgment, becauſe the court has no authority to proceed in a matter of ſubſtance different from the original. * Page 50.

If a man pleads to the action of the writ, he allows both the form of the count, and the writ; for if he admits, that if the form of the writ and count were adapted to the plaintiff's caſe, that ſuch form is good and ſufficient, ſince to object to the action not quadrating to the plaintiff's * caſe, does admit, that if it be ruled by the count, it does allow that the plaintiff has before the court a count in form ſufficient. * Page 51.

If the defendant pleads in bar to the action, he admits the form of the writ and count, for he anſwers to the right in demand, and puts that right in iſſue; and thereby admits that there is a ſufficient form to put the right in iſſue; and therefore though a man pleads *non aſſumpſit modo & forma*, yet the *modo & forma* does not traverſe the form of the writ or count, but the ſubſtance of the promiſe only; which is the true reaſon why you may give another promiſe in evidence, different in time

time and place from that mentioned in the declaration, though not different in ſubſtance.

2 Saund. 41. But if the defendant pleads a collateral matter, this ought to be proved in the ſame manner it is alledged, unleſs it goes in bar of the action in any form; ſo that pleas are of two ſorts, either dilatory or peremptory.

The *firſt* is twofold, (*viz.*) to abate the writ, or defer the proſecution; that of abatement of the writ was by matter ſhewn *dehors*, or upon the face of the record itſelf; ſuch as were *dehors*, were pleas to the juriſdiction, or in diſability to the plaintiff, or privilege in the defendant, or ſhewing

* Page 52. * miſtakes in the writ itſelf; all theſe were to be pleaded in † four days, unleſs ſpecial leave from the court, becauſe the perſon coming in by proceſs of the court ought not to have time to delay the plaintiff: but where there is a variance between the original and the count, or the bond, and an oyer prayed, there the variance may be pleaded; becauſe it was uſual for the pleaders to ſhew it to the court, and have the writ abated; theſe taken down by the prothonotary were the original of thoſe pleas in abatement: but when the recital of the writ and the count itſelf were entered on record, if there were any material variance, the defendant might take advantage of it, not only by way of plea, but by motion in arreſt of judgment after the verdict, or by a writ of error, becauſe the writ being the foundation and warrant of the whole proceedings, if the plaintiff did not purſue it by his count, there was no authority to the court to proceed in ſuch caſes.

2 Lutt. 1881. Hob. 19. 1 H. 6. 23. Cro. El. 829. Norton & Palmer.

Keilway 211, 212, 213.

If the objections appear on the face of the writ itſelf, they are always objections to the legality, of which the court are judges, and not the jury; and

† Theſe four days were underſtood to be four court or law days, in the four enſuing courts; but not four days in any one and the ſame term. See p. 9. Note.

and therefore, when they were ſhewn to the court by the defendant's counſel, the judgment was *quod breve caſſetur*; if the objection was not good, the writ ſtood, and therefore ought * to be anſwered, and there the judgment was *reſpondeat ouſter*; if they pleaded another matter immediately, it is probable the dilatory objection was not entered, becauſe the peremptory plea was the proper act at that court. * Page 53

But where they ſhewed a dilatory exception, and there was judgment that they ſhould anſwer over, and they craved a *libertas interloquendi*, and this not ending in any thing peremptory, it is very probable the prothonotary entered on record, from his own minutes, the whole tranſactions as an act of the court; but where any matter *dehors* was pleaded, and which, if true, would have abated the writ there if they had gone to iſſue upon it, and it was found for the plaintiff; the plaintiff had judgment, *quod recuperet*, becauſe the defendant choſe to put the whole weight of his cauſe upon this iſſue, when he might have pleaded a peremptory plea, and going to iſſue on it is like the caſe of double defences before the ſtatute; the law ſaid if it be true it is a ſufficient defence, and you ſhall not uſe two precedents: but if the defendant pleads a matter *dehors* in abatement of the writ, and the plaintiff replies, and the defendant demurs to the plaintiff's replication, this immediately refers the replication to the conſideration of the court; and ſince, if he * had then referred the plaintiff's writ to the court, the judgment would have been to anſwer over; therefore, if he at the ſame time refers the replication to the court to judge whether it is good or not, there is the ſame judgment to anſwer over: but if he had referred the action itſelf to the court to judge of the legality thereof, there, that not touching the writ depending in court, but the plaintiff's whole demand, it was admitting the truth of the demand, * Page 54.

becauſe

Poſt.

becauſe *ex facto jus oritur*, the court never pronouncing what was the law till the fact was firſt ſettled; and therefore the defendant, referring the legality of the plaintiff's demand to the court, admits conſequently the truth of it.

Raſtaff 360, 362, 379.

The *ſecond* ſort of dilatory pleas, or temporary bars, whereby the parol is to demur, till full age; and theſe are pleas peculiar to the feudal law; for in the civil law the guardian was party to the ſuit inſtead of the infant; and if there was *mala fides* his defence, he was to anſwer it to the infant.

But the wardſhip in the feudal law was of another nature, for the guardian has the whole profits in the eſtate, and alſo the marriage of the infant, which was in order to bring him up to arms, and to marry to ſuch perſons, as they thought might continue the martial ſtrain, that ſo the * Page 55. ward * might ſubſerve the original deſign of the tenure.

Hence it was, that the guardian was not truſted with the action, and by conſequence it was a *maxim* amongſt them, that the infant could not be party to the ſuit: but this *maxim* was confined to ſuch caſes, where the right of the feud was in demand, and was not allowed to actions touching the poſſeſſion; and the reaſon was from neceſſity; for if the infant was not allowed to defend his poſſeſſion, an infant would be ſtript of all he had during his minority; and ſo of injuries done by an infant,

Infancy no Plea to a tort. 3 Keb. 59.

the parol ſhall not demur, becauſe then a general licence would be given for infants to commit injuries; the proſecution of thoſe actions was committed to the next friend, and the defence of the actions againſt an infant to a ſpecial guardian aſſigned by the court; but actions concerning mere anceſtral *actions* continued as they were, that the right of the feuds might not be charged during minority; therefore in aſſizes of *novel diſſeiſin* and *mortdauceſt'* the infant had not his age, becauſe that was an action brought of his own ſeiſin, or his

his anceſtors dying during minority, becauſe the wife muſt be ſubſiſted.

So in a *Quare impedit*, becauſe the church muſt be filled.

* So in an attaint, becauſe the petit jury may die. In a *ceſſavit* by deſcent, though it be of his own ceſſor, he ſhall have his age, becauſe he cannot tell what arrears there are; and if he does not make a true tender, he loſes the whole for ever. * Page 56. 9 Rep. 85.

If it be a purchaſe, it ſeems otherwiſe, becauſe that is not an ancient feud of the family for which he was to be in ward.

But on a *formedon in diſcender* and *remainder*, becauſe *voluntas donatoris in charta ſua manifeſte expreſſa de cætero obſervetur*, and being founded on what is exactly expreſſed in the deeds, though it be a droitural action, yet it may be purſued during minority; but if the tenant pleads a bar by warranty and aſſets, there the parol ſhall demur, becauſe that concerns alſo the inheritance of the infant.

But in a *formedon in reverter*, the parol ſhall demur, becauſe he claims as heir in fee ſimple to the reverſion, and not *per formam doni*; and therefore the right of the fee would be bound.

But in all caſes on the fee, as if an action of debt on the obligation of the anceſtor be brought againſt the heir, there the parol ſhall demur, becauſe that lays a burthen on the fee, which by the law was to be preſerved intire till the infant came of age, ſince the profit was given away during his non-age to the lord.

* CHAP.

* Page 57.

*CHAP. V.

Of the General Iſſue and Pleas to the Action.

AS they had theſe dilatory pleas, ſo alſo had they thoſe that were peremptory, which were ſo formed, as to divide the matter of law from the matter of fact, according to the rule in *Bracton*, † *ad quæſtionem juris non reſpondent juratores.* From

† "The annotiſt ſays, that this indeed is a maxim in the civil-law juriſprudence, but it does not bind an Engliſh jury, for by the common law of the land the jury are judges as well of the matter of law as of the *fact*, with this difference only, that the "Coyle" or judge on the Bench is to give them no aſſiſtance in determining the matter of *fact*, but if they have any doubt amongſt themſelves relating to the matter of *law*, they may then requeſt him to explain it to them, which when he hath done, and they are thus become well informed, they, and they only become competent judges of the matter of *law*. And this is the province of the judge on the bench, namely, to ſhew or *teach* the law, but not to take upon him the trial of the delinquent either in matter of fact or in matter of law. "ꝥæꝛ beo on ðæꝛ ꝛeme ge mote Biꝛceꝛp. ⁊ ꝛe Ealdoꝛman. ⁊ꝥæꝛ æꝛ eꝛ tæcan Lodeꝛ nihte, ge peoꝛulꝺ nih te. "*Edgar*'s laws, *c.* 5. And again in king *Canute*'s laws 17. ðæne beo on ðæne ꝛcine Biꝛreop ⁊ꝛe Ealdoꝛman. ⁊ ðæꝛ æꝛeꝛ tæcan ge Lodeꝛ nihꝛ ge ponulꝺ nihꝛ:" in neither of theſe *fundamental* laws is there the leaſt word, hint or idea that the earl or alderman (that is to ſay, the prepoſitus of the court, which is tantamount to the *judge on the bench*) is to take upon him to judge the delinquent in any ſenſe whatever, the ſole purport of his office is to *teach* (tæcan) the ſecular or worldly law: and if the jury ſhall, after they be thus taught, paſs an unjuſt ſentence, they are liable to be attainted for the mortal offence of "Lahꝛlaꝛe" or ſlighting the law.—See farther the note in page 71. "*Qui debent eſſe judices.*" See alſo *Britton*, *c.* 98. in the article of *attainte*, where many different precedents are mentioned, in which the jury are manifeſtly judges both of matter of law and matter of fact. This *common law* doctrine is alſo ſpecially confirmed and explained by 13 *Ed.* 1. *c.* 30. in the following words, "item, it is alſo ordained, that the juſtices aſſigned to take aſſizes *ſhall not compel the jurors preciſely to ſay*, whether the matter before them be diſſeiſin or not, *dum modo* VOLUERINT *dicere veritatem facti, et* petere *auxilium juſtitiariorum.* "(The jurors muſt be left to their *free will* in ſpeaking the truth) *ſed ſi ſponte voluerint dicere quod diſſeiſina eſt, vel non admittatur eorum veredictum ſub ſuo periculo.*" Whether diſſeiſin or no diſſeiſin, certainly is a *point of law*, and of which the jurors are by this ſtatute declared the ſole and only judges.

From hence it was that they formed the demurrer, which ſuppoſed the fact; and referred the law to the court; from thence alſo they formed the general iſſues in every action, which was referring the fact mentioned in the declaration to the jury; and as the court of *Chancery* formed all general and ſpecial writs, ſo the *Common Pleas* formed all general and ſpecial iſſues:

The general iſſues were contrived in ſuch words as were proper to deny the whole fact in the declaration; thus, if a charge was of treſpaſs, the general iſſue was, that the defendant was not guilty; if he were charged with a debt, that he owed nothing; if he were on a ſpecialty, he admitted the debt, unleſs he denied the deed, becauſe the ſeal continuing, it muſt be diſſolved *eo* * *ligamine quo ligatur*; for there was that credit given to the ſolemnity of the ſeal, that he could not ſay he did not owe, when it appeared by the acknowledgment of the ſeal, that he was indebted. * Page 58.

But if the debt were on ſimple contract, then he might plead that he owed nothing, becauſe it did not appear by the ſeal, that there was any debt continuing; and in that caſe he might even wage his law, ſince, if he truſted to the honeſty of the defendant when he lent his money, he was obliged to do it, if the defendant denied it on his oath, with perſons atteſting to his credibility; the aſſize was a contrivance invented by *H.* 2. to try the right, inſtead of joining iſſue by battle: and theſe were taken in the *King's Bench*, or *Common Pleas* for the county in which they were ſitting; but they were adjourned for difficulty into † the *Common Pleas*, as the centre of all civil juſtice; in the ancient way they did not join iſſue by battle where they could produce the inveſtiture, which Booth 213, 214. 215, 270.

was

† At this period of time there was no court of Common Pleas at *Weſtminſter*, all common and indeed all pleas in general were tried in and by the county in which the cauſe of action aroſe.

was ſigned by the parties, or when there had been a deſcent from the perſon who had appeared tenant on the roll; and this trial was called *jurata coram juratoribus:* the aſſize being invented, and that coming in, inſtead of the battle, they pleaded pleas why the aſſize ſhould not be taken; and
* Page 59. where iſſue was joined on ſuch pleas * (though it was tried by the recognitors in aſſize) it was ſaid that the aſſize, did *tranſire in jurata*: when they pleaded what they called a *flat bar* to the aſſize, and iſſue was joined upon it, they never inquired of the *ſeiſin* or *diſſeiſin*, which was called taking the aſſize at large; but if the plea was found againſt the defendant, they proceeded to inquire of damages only: but if he pleaded only a colourable bar that is, ſuch a bar where they gave colour, then they proceeded to take the aſſize at large, which was done in this manner; the aſſize ſhewing no title in the plaintiff, the defendant would ſhew his own infeoffment or inveſtiture; but becauſe ſuch feoffment was only evidence that there was no *diſſeiſin*, it would amount to the general iſſue without colour; therefore the defendant urged that the plaintiff obtained by virtue of an inveſtiture on which the ceremony of livery had never paſſed, and the validity of ſuch inveſtiture being a queſtion of law, was not to be anſwered by the jury; and therefore the plea of his own inveſtiture, which alone would have been only evidence of no *diſſeiſin* joined to the plaintiff's title, which turned on a queſtion of law, and drew the cauſe from the jury to the court, this obliged the plaintiff to ſhew by what inveſtiture he claimed, and then the aſſize
* Page 60. * was taken at large on the title of the plaintiff; this was done that the plaintiff's title might appear on record, and the plaintiff be confined to give evidence touching that title, that the jury might not wander from that evidence; and if they did, they might have proper evidence, to convict them on *attaint*, having ſomething on record to which they might

might apply their evidence. If an infant plead a flat bar, and the bar is found againſt him, yet the aſſize ſhall be taken at large, becauſe the law not allowing the parol to demur in this action, which was *feſtinum remedium*, ſo they inquired of the *ſeiſin* and *diſſeiſin*, that the infant's whole title might be before the court and might not ſuffer by his pleading. Whenever the plaintiff miſſed his time, or was barred in the aſſize, he was driven to the writ of right: but when the defendant had the advantage, to ſecure his poſſeſſion, he might chuſe whether he would join iſſue by battle or by aſſize, ſince there was a recent *diſſeiſin*; ſo that the plaintiff had the firſt choice in the writ of aſſize; but if he miſſed his time of choice, the election was in the defendant.

The pleadings in other actions were ſettled conformable to what was done in the aſſize; for they gave the defendant, if it were a matter of fact, the liberty of pleading * the general iſſue, or traverſing any material point of the declaration; but he could not plead a plea that amounted to the general iſſue, for pleas that amounted to the general iſſue were only facts on which the iſſue might be turned in evidence; and therefore were not iſſues of fact to be returned to the court, but matters of evidence to be determined by a jury; and conſequently not a good plea, becauſe they drew to the examination of the court, what was proper to be determined by the jury; but they gave the defendant leave to traverſe any material point in the plaintiff's declaration, in order to bring that one ſingle point in iſſue, and to which they might apply their evidence alone: ſo that if the jury on that point gave a corrupt verdict, they might be more eaſily attainted, which was not ſo readily done on a general iſſue, where the matter was more complicated; therefore in debt for rent, if it were by deed, they might plead *non eſt factum*; if it were without deed, *non dimiſit*, or nothing in arrear,

* Page 61.

rear, or that they never entered, unleſs it was by deed, and there they were eſtopped by their own acceptance; and yet all thoſe points were in iſſue on *nil debet*; and *nil debet* was a proper iſſue for rent, notwithſtanding the indenture, becauſe an indenture did not acknowledge a debt like an obligation, * ſince the debt accrued by ſubſequent enjoyment; and therefore he was not eſtopped by the indenture, to ſay he owed nothing. As in aſſize the defendant might ſhew to the court any matter by way of bar why the aſſize ſhould not be taken, ſo in all perſonal actions he might ſhew any matter to the court why the action did not lie; and this was proper to ſhew the court, and not the jury; becauſe it was a matter of law how far the action lay, and not a matter of fact whether a declaration was true; and there ſuch queſtions were produced to the court, and not to the jury, ſince they were firſt queſtions of law, whether ſuch bars properly diſcharged the action; but they might be traverſed whether true or not, which ſubſequently drew them to the examination of the jury.

* Page 62.

Poſt. But, if the defendant plead to part, he muſt traverſe the other part; becauſe the other matter remains ſtill a fact to be tried by a jury, there being no queſtion of law moved concerning it; but if the plaintiff did not pray judgment for that part unanſwered, it was a diſcontinuance, becauſe he did not inſiſt on the judgment of the court for want of an anſwer, nor had put it into any proper way of examination; and being not put under examination by the defendant, nor prayed by the plaintiff to be adjudged as a * matter admitted by the defendant, it was a queſtion out of court, ſince the plaintiff by not following it to a proper determination has diſcontinued it. Whatever made the fact complained of to be lawful was matter of juſtification, and to be ſhewn to the court;

* Page 63.

court; becauſe the court was judge what was law and how far the fact, if done, was lawfully done; the jury were only judges whether the fact was done or not: therefore on not guilty of the treſpaſs, the defendant cannot ſhew licence to prove there was no treſpaſs, becauſe though the licence makes it no treſpaſs, yet he ſhews that licence to an improper juriſdiction, *viz.* to the jury, who are not proper judges of the law: ſo if he ſhews a releaſe of debt to a jury, it is no evidence on *nil debet*; becauſe, though the releaſe makes it to be no debt, yet he ſhews it to an improper juriſdiction: but though a man muſt ſhew all matters to the court that affirm the fact complained of and diſcharge it, yet where any thing goes in denial of the fact, there it muſt be given in evidence on the general iſſue; becauſe whatever denies that cauſe of complaint is matter proper to be exhibited to the jury who are judges whether the fact was done or not: therefore actions of *trover* and *aſſumpſit* (which are modern inventions in ſome caſes to get rid * of the law-wagers which lay in the ancient actions of debt and detinue) were ſo formed, that almoſt every thing may be given in evidence on the general iſſue: thus in trover, the plaintiff declares on the property of goods and chattels, and that they come by finding in the defendant; whatever matters were alledged that confeſs property in the plaintiff, will intitle him to his damages; and whatever denied it, is on the general iſſue; and therefore levying by diſtreſs, releaſes, or the like (which were anciently pleaded in this action are now given in evidence; becauſe they diſaffirm the property of the plaintiff on which his action is founded: ſo in *aſſumpſit*, the action is formed on a contract, and the treſpaſs to the plaintiff is in the non-performance of it, and the iſſue being *non aſſumpſit* inſtead of the old iſſue which was not guilty, as *non dimiſit* was the old iſſue on an action of debt upon a leaſe,

* Page 64.

5 Mod. 92. So in actions of neglect, &c. formerly they pleaded to the neglect, but of late times that is given in evidence on the general iſſue. Noy 56. Str. 1022. Lev. 142.

and *non detinet* on the detaining of goods; yet on this iſſue every thing may be given in evidence which diſaffirms the contract, for that goes to the giſt of the action; ſince if there be no contract to be performed at the commencement of the action, there could be no treſpaſsfor the non-performance of it; and therefore a releaſe goes to the giſt of this action, for it ſhews there was no
* Page 65. * contract at the time the action was commenced; [for as in trover he muſt have a right to the thing declared on,] ſo here every thing that ſhews the contract to be void, as non-age, or more money loſt at play than the ſtatute allows, may be given in evidence on the general iſſue; for on a void contract the plaintiff has no right to any action; therefore this and the like goes to the giſt of the action. *Note*, that the *giſt* of the action is the fraud and deluſion that the defendant hath offered the plaintiff in not performing the promiſe he had made, and on relying on which the plaintiff is hurt; and therefore what goes to ſhew that there was no contract, or that it was perform-ed, or paid, or releaſed, or that there was no conſideration, and diſcharged, goes to the giſt of the action; becauſe there could be no deluſion or fraud to the plaintiff at the time of the action brought, nor could he rely on that which had no being; and therefore theſe matters need not be pleaded, but may be given in evidence on the general iſſue.

But antiently, if there was matter of law, though it amounted to a negation of the declaration, yet it might be exhibited to the court with a concluſion to the country; this was thought a proper way to exhibit it to the court at firſt, when
* Page 66. the proceedings * were *ore tenus*, becauſe it ſaved the time and expence of trial, and ſince being a matter of law it was found ſpecially by the jury, and returned back to the court; from hence came the ſpecial iſſues of *non eſt factum*, as that the obligor

obligor was covered or not lettered, or that it was not ſo read to him, and *ſic non eſt factum*; ſo in trover and *aſſumpſit* they pleaded a releaſe, or *infra ætatem* in an *aſſumpſit*, becauſe they are matters of law, though they are a negation of the plaintiff's declaration, and were therefore proper to be referred to the court in the firſt inſtance: but matters of law, which do not go to the giſt of the action, but to the diſcharge of it, even in theſe new framed actions, are to be pleaded, as the ſtatute of limitations; and ſo if a leſſer ſum be paid before the time, becauſe that is not a performance, which deſtroys the being of the promiſe, but a collateral agreement, that ſupplies the performance of it.

In all pleadings, where-ever a traverſe was firſt properly taken, the iſſue cloſed; and therefore a traverſe cannot be taken on a traverſe; if a traverſe be taken to the declaration, it deſtroys the plaintiff's action; if to the bar, it deſtroys what is ſaid in avoidance of the action; and if to the replication, what was ſaid in avoidance of the bar, *& ſic de cæteris*; and conſequently, * where a ſubſequent traverſe is taken, the reſt ſtands confeſſed. * Page 67.

If a man demurs to part, and takes iſſue on the other part, or if the declaration be againſt two defendants, and one demurs, and the other takes iſſue, the court ſhall determine which they pleaſe firſt; for in both caſes there are two iſſues, the one in law, and the other in fact, each of which is independent of the other; ſince wherever there is a demurrer *quoad* that perſon, it is an admittance of the fact; but the defendant ſhall never plead and demur to the ſame fact, becauſe that is a duplicity, that draws the matter to two different examinations; ſince the demurrer is to be tried by the court, and the fact by the jury: and it would be expenſive and vexatious to follow the matter in both judicatures; for then a man would always Ante 54.

demur ſpecially for time, and if he was over-ruled, then he would deny the fact: but if the declaration be not a ſufficient foundation for the court to give judgment upon, this may be moved in arreſt of judgment after verdict; becauſe judgment cannot be given, when it appears, that though the fact be found for the plaintiff, yet he has not ſufficient cauſe of action: and a demurrer admits the fact to be true, and refers the law ariſing on the
* Page 68. fact to the judgment of the court; and * therefore though the fact is taken to be true on ſuch demurrer, yet if it ſtates no legal fact, the court has no foundation on which to make any judgment.

The ancient practice was, that if the matter in law on the demurrer was eaſy, the court determined it immediately, whilſt the parties were both in court; but if it went over to another term, the plaintiff ſerved the defendant with proceſs *ad audiend' judicium*; and if he appeared not at the proceſs, judgment was given againſt him: but on a real action there were two days given before judgment was given; for if he was ſerved with proceſs *ad audiend' judicium*, and he made default, this was recorded, and further day given; and if at that day he did not appear and ſave his default, then judgment was given againſt him.

This proceſs vaniſhed in perſonal actions when a defendant could make an attorney; for, after the iſſue cloſed, the attorney was always preſent as an officer of the court; and therefore it had been incongruous to have demanded the defendant when he was in court by his attorney; and therefore the plaintiff may diſcontinue his action by not following of it, yet the defendant was not demandable after he had appeared as he was of old, being in
* Page 69. court by his attorney: * but as in *Chancery* defendant anſwers *in propria perſona ſua*, and not by attorney (as there is no attorney there on record, for the clerk that appears for him only ſhews that

that his client is in court, and is not put in his place *ad lucrand' vel perdend'*, as at common law) thence is the *ſubpœna* for the defendant to come in and hear judgment: ſo, in real actions, the defendant was obliged to appear himſelf; becauſe his inheritance was concerned, and therefore they would not give judgment final in the abſence of the party: therefore they ſummoned him at *niſi prius*: in a perſonal action, the defendant was called: becauſe it was not preſumed that the attorney, who was an officer of the court, was attending at the *niſi prius* in the country, whence they called the defendant himſelf; but then by the *ſtatute* of *Weſtminſter*, the judgment, if he did not appear, was taken by default, as aforeſaid.

* CHAP. VI.

* Page 70.

The Jury Proceſs.

ON ſettling the law in the courts above, they had the matter of law decided † by the king's juſtices, but the matter of fact by the *pares*; and therefore the *jurata* were to be ſummoned from the place where the fact was laid, ‡ and antiently from the very hundred where it aroſe, ſince thoſe facts were determined in the court of the hundred; but becauſe it was difficult

† Who were the king's juſtices, ſee the page following.

‡ This poſition is wholly incompatible with the common law, for the jurata were the ſole judges both of the law and the fact, and for that reaſon were not only ſummoned from the four decennaries neareſt adjoining the place where the offence had been committed, but were ever reſponſible themſelves to make good the damages ſuſtained by the plaintiff if the defendant fled from juſtice. See *Edward* the Confeſſor's laws, confirmed and enlarged by *William* the Conqueror. chap. 20.

to get twelve freeholders in every hundred, the court contented themſelves with four, and afterwards, (*viz*) 21 *El. c.* 6, if two appeared it ſufficed; if ſuch perſons were not returned, the array was challenged on the polls, if they were not hundredors; and this was to ſecure, that ſome at leaſt of the *pares* of the hundred might be at the trial of every fact, in order to have the ſame ſettlement of the fact by the men of the neighbourhood, as was uſed by the feudal court for the deciſion of right there; ſo that the jury were originally nothing but the ‡ *pares* of the lord's courts transferred into the king's court, by a particular writ; but now by the ſtatute for the amendment * of the law, thoſe hundredors are not neceſſary, for the *venire* is awarded *de corpore comitatus*, unleſs in criminal matters, and upon penal ſtatutes.

Lil. E. 45.

* Page 71.

4, 5. Anne.

The jury when impanelled judged under the penalty of an attaint in the old law, as appears by *Glanville*; if a falſe judgment was given in the court below, † and they were arraigned for this falſe judgment in the king's court, they were obliged to wage their battle, not by an extraneous perſon, but by one of themſelves; and if they proved recreant, they loſt *liberam legem*, the lord loſt his court, and the whole court was in *miſericordia*.

---

‡ Not *pares* of the Lord's courts, but *pares* of their own decennaries; for free-*men*, ſimply ſuch, were admiſſable to the lord's court, but free-*holders* only were admiſſable to ſit in judgment upon a decennary free-*holder*. For inſtance, the *ſervants* of a great baron being *in plegio domini ſui*, became *ipſo facto* freemen, but theſe free-*men* were not *compares* with ſuch free-*holders* who lived *ſub eorum proprio plegio*. For the latter were ſureties or bail for one another, but the great-baron ſingly was ſurety or bail for *all* his domeſtic ſervants.

† The court *below* means either in the decennary court, the court-baron, or the hundred-court; for the higheſt court (or what was then called the *regis juſticia*) was the county-court. In the 29 *cap.* of our firſt *Henry's* laws, intitled, "*qui debent eſſe* judices regis," are the following words "*regis judices debent eſſe omnes barones comitatus qui* liberas *in eis* terras *haberet, per ques debent cauſe ſingulorum ulterna proſecutione tractari.*"

cordia. Gla. lib. 8. *c.* 9. *fo.* 66. Inſtead of this, cam the *Norman* way by a grand jury of twenty-four; but the perſons, if convicted, were under the ſame diſabilities with a champion recreant in ſuch a caſe, for they loſt *liberam legem*, and they received the villanous judgment, which every champion received, that, maintaining another's right by battle, failed; for their verdict was the aſſerting of the right of the perſon for whom it was given. But this was ſo ſevere a judgment, that they allowed all manner of evidence in ſupport of their verdict; but againſt the verdict they admitted none that was not given at the former trial, becauſe the jury might give in their verdict, not only on the evidence given in *court, but on their own knowledge; and therefore whatever other ways they came to the knowledge of the fact, they might give in evidence for the ſupport of their verdict; but the evidence not offered on the trial can never be brought againſt them, becauſe ſuch evidence might have altered their judgment had it been given; and the want of that light, which the party neglected to offer, cannot convict them of a falſity, which, if it had been offered, might have founded a different verdict. * Page 72.

The ſame proceſs that was uſed in the lord's court to bring in the parties and juries (*viz*) ſummons, attachment and diſtreſs was uſed in the king's court; for the *venire* anſwers the ſummons; the *habeas corpus* † the attachment; and the *diſtringas* is the diſtreſs infinite; and then as in caſe of the king they often drop one proceſs, as in treſpaſs the ſummons, beginning with the attachment, ſo in the king's bench and *exchequer*, when the criminal buſineſs was tranſacted, and the king's dues demanded, they dropt the *habeas corpus*,

† The *habeas corpus* is widely different in its effect from the *attachment*; For by the *former* writ, the body is taken into cuſtody; by the *latter*, only goods and chattels.

corpus, and proceeded on the *diſtringas*; the ſummons was omitted in treſpaſs, that the offender might not fly from juſtice by notice; but it is not preſumed, till the contrary appears, that the jury would not obey the ſummons; but in the king's caſe, if they did diſobey, * they made uſe of the ſtrongeſt proceſs, (viz.) the *diſtringas*.

If all the jury did not attend on the *habeas corpus* or *diſtringas*, which was to bring them into court, there were *undecim*, *decem*, or *octo tales*, according as the number was deficient, to force the ſheriff to the king's court to try the iſſue; this was without ſummons or *venire*, becauſe it was preſumed that the firſt *habeas corpus* and *diſtringas* had given notice to the *vicinity*, that they muſt appear; and therefore the ſupplementary tales were forced in without a particular ſummons to them.

This delay foreſeen by *Ed.* 1. that when he ſent his further juſtices in *eyre* to diſpatch buſineſs in their proper counties, that the jury muſt not be kept up to the courts above, which would be a great expence, and great conflux of people to thoſe courts, and therefore he conſtituted the juſtices, that the matters of the law ſhould be in his own court, and the facts in the country; and thereon there was a perfect uniformity in the law, for the ſame juſtices *itinerantes* in one time, who tried the fact in term time-ſettled

---

‡ The ſummons was not omitted in treſpaſs, for the reaſon here aſſigned: for the defendant might fly from juſtice as eaſily upon the diſtringas of his goods and chattels, as upon ſervice of the ſummons: but in matter of treſpaſs, ſuch as maihem, falſe impriſonment, pound-breach, battery and the like, the ſummons was omitted only to haſten the proſecution in the inferior courts, as *Britton* well obſerves, *Si le plea ſoit* ailloures *qu'en* notre court, *et le defendant ne vient pas, et ne ſe faiſſe pas eſſoigner, nos voulons que le jugement ne ſoit jamais delayer jus qu' à le quarte jour, mais tantôt ſoit awardé le premier jour par le ſureties (de plaintiffe) que telles diſtreſſes ſoient retenues, et que homme preign plus, et iſſient de court en court.*"

ſettled the law; and henceforward when they found this anſwered the expectation, the juſtices in eyre were totally diſuſed.

* The manner of contriving it, was to direct the *venire* to return the jury at ſome day the next term, unleſs the juſtices *prius tali die & loco venerint*; and thus the *niſi prius* was at firſt on the *venire*, and continued in that manner from *Ed.* 1. to *Ed.* 3. for though there were no iſſues returned on the *venire* to make them appear at *niſi prius*, yet it was ſo much a greater difficulty on them to appear afterwards at *Weſtminſter*, which if they did not, the *diſtringas* iſſued, that it had its effects to bring them in their proper counties; the writ was contrived to command them to come into court, becauſe it would have been improper for the court to have commanded them to come into any other place, ſo that their appearance before the juſtices of aſſize is an excuſe for their non-appearance in bank; but if they did not appear at the aſſize nor at *Weſtminſter* there iſſued an *habeas corpus* and *diſtringas* to bring them up. * Page 74.

By *Weſtm.* 2. *cap.* 27. the defendant might be eſſoined in an aſſize or *niſi prius* the firſt day; but if he had an eſſoin at *niſi prius* the inqueſt was taken by default in aſſize.

By the *ſtatute* of *Marlbridge*, *cap.* 18. *poſtquam aliquis poſuerit ſe in inquiſitionem aliquam, non habebit niſi unicum eſſonium*; and the ſtatute not limiting they time when * the eſſoin ſhould be taken, they might take it on the *diſtringas*; ſo that when the jurors to ſave the penalty had come on the *diſtringas*, one of the parties eſſoined himſelf, and the jury after much expence and trouble were obliged to return *re infecta*; for this inconvenience, a remedy was drawn from *Weſtm.* 2 *cap.* 27. which ſays, *poſtquam aliquis poſuerit ſe in inquiſitionem aliquam proximum diem alloquetur ei eſſonium*: and the *proximus dies* was the return of the *venire*, and then by this conſtruction they got rid of the eſſoin at *niſi prius*; for they made the * Page 75.

2 Inſt. 417.

the *venire* returnable at a day within that term in which iſſue was joined, and the defendant was obliged to be in court during that whole term, ſo that they made a *proximus dies* in the ſame term that iſſue was joined; and there was no miſchief in this, becauſe, after the parties had leave to appear by attorney, they were diſcharged themſelves from a conſtant attendance in court, as their attornies conſtantly attended for them; hence the *dies datus* was omitted in the *Common Pleas* in the award of the *venire*, becauſe the party being in court that term in which iſſue was joined, continues in court by his attorney during the whole term; but yet the *proxim' dies* after iſſue joined, muſt be the day of the return of the *venire*, and by conſequence the time * when he was to caſt his eſſoin, then he had no other day to do it by the words of the ſtatute; and by this conſtruction they got rid of all the eſſoins on the behalf of the defendant at the day in *niſi prius*.

* Page 76.

Alſo there was no *dies datus* on the return of the *diſtringas*, becauſe the inqueſt might paſs, though the defendant made default at the day in *niſi prius*; and therefore it was not neceſſary to give him a day there; yet if he reaſſumed the conſideration of their giving judgment, they iſſued a *diſtringas ad audiendum judicium* to give a day to the party, that nothing might be determined in their abſence: but in the *King's Bench* they gave a day on the return of the *venire*, becauſe anciently the *King's Bench* had not buſineſs enough to ſit the whole term *de die in diem*, and therefore they adjourned from one day to another; they gave a day to the parties to be preſent when they ſat, but there was no day given to the parties on the *diſtringas*, for the ſame reaſon as in the *Common Pleas*, *viz.* becauſe the inqueſt might be taken by default.

First.

The ancient practice of the defendant being eſſoinable of the *venire*, was a great miſchief in this

this proceſs; becauſe, if he did not appear, the jury was afterwards obliged to appear in bank; and there was another miſchief in this proceſs as it then ſtood, * the parties, not ſeeing the panel beforehand, they could not be prepared to make their challenges; the firſt of theſe miſchiefs was pretty well remedied as to the plaintiff by laying the coſts on the defendant where the plaintiff prevailed; but the ſecond miſchief had no remedy till 42 *Ed.* 3. *c.* 11. whereby it is ordained, that no inqueſts but aſſize and delivery of gaols be taken by writ of *niſi prius*, or other manner at the ſuit of great or ſmall, before the names of all them that ſhall paſs in the inqueſt be returned into the court, and the neareſt and moſt ſufficient; and this ſet the proceſs on the ſame foot it now ſtands. Second. * Page 77. Reg 178.

From henceforward they could not place the *niſi prius* in the *venire*, as was directed by the ſtatute of *Weſtminſter* 2d. becauſe it is directed that no inqueſt be taken at *niſi prius* till the inqueſt be returned in court, and therefore the clauſe of *niſi prius* was taken out of the *venire*, and placed to the *habeas corpus* and *diſtringas* in the reſpective courts, which was ſo awarded on the roll in the *jurata*; this had many good effects; firſt, for that the plaintiff and defendant knew the names of the jury in order to challenge. 2*dly*, the *venire* being returned, the defendant had no eſſoin on the *habeas corpus* and *diſtringas*, but was obliged to appear, or elſe by *Weſtminſter* 2. * *cap.* 27. the inqueſt was taken by default, as if he had appeared, not that there was judgment given for default, becauſe having the day at *niſi prius*, from whence he might be detained by inevitable neceſſity, they thought it too hard to give judgment againſt him for the default, without allowing him to excuſe it; yet the inquiſition was taken that the plaintiff might not be delayed, as it was on the ſecond default of the defendant on the aſſize; * Page 78.

ſo

ſo that when a *venire* had been returned, there was no eſſoin on the *diſtringas*.

The ſecond advantage was, that the jury on the *niſi prius* were fined if they did not appear; and therefore the clauſe in the *diſtringas* is, *quod habeas corpora eorum coram nobis apud* Weſtminſter *die lunæ prox. poſt, vel coram juſtic' noſtris ad aſſiſas in com' tuo tenend' aſſign' ſi prius die, &c.* Since they could fine them on this proceſs according to their offence, they granted *niſi prius* in the enſuing *diſtringas*, and did not compel them to try it at bar, which was more convenient than the ancient way, where the appearing juror was obliged by his companion's default to come up to *Weſtminſter*; but now every one had iſſues returned on him for his own default, and ſtill the aſſize continues the name of *niſi prius*.

* Page 79. * But to explain this further, we muſt conſider how theſe continuances are made after iſſue is joined; if it be an iſſuable term, the *venire* is made returnable the laſt day of the term, without any *niſi prius* in it, as it anciently was, and from that day the *diſtringas* is teſted with a *niſi prius* returnable at the day in bank; if iſſue be joined, and they do not go to trial the ſame term, then they award a *venire* on the roll, returnable the ſame or the next term; and if they do not go to trial, they continue the proceſs by a *vic' non miſit breve*, and then there is on the roll a new *venire* awarded till the vacation, when they go to trial, and when they are going to trial they take the roll and enter the continuances to the *diſtringas*, which award of the *diſtringas* is never entered on the plea roll, but only at the 1ſt *day of next term after the aſſizes*; when the *poſtea* is returned, they enter it *poſtea continuato inde proceſſu*, which is a recital of the continuance warranted by the *niſi prius* roll; the reaſon of this practice is, that if they had entered the award of the *diſtringas* on the plea roll, and had not gone to trial, they muſt

Co Entries. 149.

Called the Day in Bank.

muſt from thence award an *alias* and *pluries diſtringas*, which would have obliged the jury to come in terms, and in terms not iſſuable: by this practice they ſaved all trouble and expence * of that nature, and yet they continued the acts of the court as well, for *poſtea continuato inde proceſſu* ſhews on the plea roll that the laſt award of the *venire* in the former form was continued to the day in bank by the proceſs, *viz.* by the *diſtringas*, and the award of the *diſtringas* was not neceſſary to be entered, ſince it was an act relating to a trial out of the court, and not in the court itſelf; and therefore, preparatory to the trial, was formerly entered on the *niſi prius* or iſſue roll, ſo called, becauſe on it the pleadings were entered to the iſſue at that time; and as it was unneceſſary to enter the continuance on the plea roll, ſo it was not expedient, becauſe ſuch continuance would have embarraſſed the parties and jury; and therefore a general entry was thought ſufficient on the *niſi prius* roll; they enter the declaration and pleadings to the iſſue joined, together with the firſt award to the *venire*: but to ſave the trouble of ſuch entry of continuances, they enter the *placita* of the term in the vacation, when they go to trial, at the bottom of the *niſi prius* roll, between the award of the *venire* and the *jurat* roll; and this ſhews the judge of aſſize that it was an iſſue continued to the laſt term, and is a warrant to the officer above to continue the *venire* until the time of iſſuing * the *diſtringas*: hence in the *Common Pleas* they make no *placita* at the bottom when they go to trial the ſame term iſſue is joined; for that would apparently be unneceſſary, ſince ſuch *placita* came inſtead of the continuances: but in the *King's Bench* they always entered the *placita*, though they went to trial the ſame term; becauſe anciently the continuances in that court were from one day to another in the ſame term: and it is to be noted, that

* Page 80.

* Page 81.

that in the *Common Pleas* there was anciently a continuance roll for the jury proceſs; ſo that after the *venire* was awarded, and the jury proceſs was continued from term to term, they entered the continuance on a roll of that day, to which ſuch proceſs was continued, entering up the ſtile of the court on the top of ſuch roll, and numbering the roll; and ſo when it continued to a ſubſequent term, they entered on the continuance roll of that day in the ſame manner; and when the *poſtea* came up, then their entry was made in this manner, *poſtea continuato proceſſu præd' inter partes præd. per jur' ponit' inde inter eos in reſpectum huc uſq; ad tunc diem ſcil' in octab. ſancti trinitat', niſi juſticiar' prius, &c.*

And when ſuch records were ſent for by writ of error at the end of the judgment, they ſent the *placita* of the particular times of continuances to warrant that part of the roll that mentions the *continuato inde proceſſu*; and this is evident from *Raſtall's* entries, title *error*, in a notable roll in the 5 *Ed.* 4. where the very number of each roll of continuance is entered at the foot of the judgment: after 32 *H.* 8. 30. the continuance roll was dropt, becauſe by that *ſtatute*, all diſcontinuances were cured after verdict; and therefore they only entered on the plea roll the award of the *venire*, which they continued as before-mentioned by a *vic' non miſit breve*; but now that is dropt, and they only enter *poſtea continuato inde proceſſu inter parties præd'*, entering the verdict returned on the *poſtea*; and they need not on the foot of the record enter any continuance, ſince the want of a continuance is cured after verdict; but they enter the *placita* and the award of the *diſtringas* on the *niſi prius* roll, to be an authority to the judge to try the cauſe.

* Page 82.

Raſtall 288.

The day at *niſi prius* and in bank are in conſideration of the law the ſame; becauſe the writ of *niſi prius*, which gives authority to the judge to

to try the cauſe in the county, is inſtead of the court; and therefore the *poſtea* certified by him on the day of bank is the ſame as if the jury had come up to the court; and this (as was ſaid) is for the eaſe of the ſubject, that the jury and witneſſes may not be brought out of their proper county. * Page 83.

If a *venire* is awarded, and they do not go to trial the next aſſizes, but it lies for ſeveral terms, the continuance may be made by a *vic' non miſit breve*; but if a *niſi prius* be awarded, and ſome of the jury appear, and the panel be not full, ſo that the trial is not carried on, they only enter thoſe of the jury that appeared, *et alii non venerunt, ideo reſpectuentur* to the next term *pro defectu jur'*; and at the day in the next term they award an *alias diſtringas* to the next aſſizes with a *niſi prius* until the next term. Vid 6 Hen. 6, 2.

CHAP. VII.

The Venue.

ON the ſettling of the *niſi prius*, they obliged the plaintiff to try the action where it accrued; and the altering the *venue* began in the *King's Bench*, and was transferred from thence into the *Common Pleas*.

The *venire* was to bring up the *pares* of the place where the fact was laid, in order to try the iſſue; and originally every fact was laid in the place where it was really * done; and therefore the written contracts bore date at a certain place, and the treſpaſſes on land, were in their own nature local, and the *decenna* was reſponſible for the appearance of the parties within their diſtricts: but when the cuſtom of *decennary* began to wear * Page 84.

off, and men could go from place to place, and the king's writ iſſued to any place where the defendant reſided, from thence they ceaſed to date their contracts at any place, that ſo they might ſue them at what place they pleaſed; for before the *capias*, the proceſs by attachment and diſtreſs could be only executed where his goods were, and this begot the diſtinction † between *tranſitory* and *local* actions; for the former related to goods and chattels, and followed the debtor where-ever he could be found; but the *latter related to lands and tenements*, and ſo the proceſs was general, and on the lands, tho' in treſpaſs *vi & armis*, the proceſs was on the perſon, but created no inconvenience, becauſe it was an action that was generally between neighbours, and the perſon had no occaſion for a writ into a foreign county in order to find the defendant.

In the tranſitory actions, the plaintiff had liberty to chuſe his *venue*, being ſuppoſed to lay it where the fact was done, and that it was done in
* Page 85. the county where the * writ was brought: but if the writ followed him into a foreign county, he having fled from the place where the fact was done, the plaintiff was at liberty to chuſe from what vicinity the *pares* ſhould be ſummoned, as the defendant had deſerted the place where the fact was done or the contract made, and other places were all indifferent.

But the defendant could not by his plea alter the *venue*, unleſs the matter pleaded was local.

The reaſon ‡ of the *diſtringas* was that where the *decenna's* were broken, there people were obliged to anſwer locally, the plaintiff was neceſſitated

† This diſtinction is of modern date.

‡ According to the annotator the law of *decennaries* in the laws of *Edward* the Confeſſor differs entirely from the law here laid down: for (as he ſays) the decenna's were always to be kept *full*: and to aſcertain whether they were or were not full was one of the principal enquiries in the eyre.

ted to ſeek the defendant, and to ſummon or attach him in the county where he reſided, and the county was put into the margin; the record begins, that the defendant was ſummoned or attached as in that county; and this notion ſeems to be borrowed from the canoniſts, where the rule is, *quod actor debet ſequi forum rei.* Lancelot's 144.

Now ſince the law obliged the plaintiff to ſeek the proper *forum rei*, the defendant could not alter the judicature of the fact by any plea that could be determined in that place; becauſe ſuch was not *alieni fori*; and it would be hard that the plaintiff, who was forced to ſeek the defendant, ſhould go elſewhere to have the cauſe determined; * but where the plea of the defendant was local, ſo that the place made part of the iſſue, there the place of its own nature was *alieni fori*; and therefore, to prevent a failure of juſtice, the *venire* was carried into a foreign county. Saund. 85. Cro. Jac. 370. Co. Lit. 282. * Page 86.

But if the plaintiff's declaration be for a matter local, where he cannot follow the perſon of the defendant, as in a *quare clauſum fregit*, there if the defendant could not be found in the county where the treſpaſs was committed, they could not follow the perſon of the defendant, and ſo they had only the proceſs of outlawry: but as the plaintiff was obliged to follow the defendant, ſo the plaintiff had his choice from what *vicinage* † within the county he would try his cauſe; for if he had been obliged to lay it in the neighbourhood of the defendant, where he was ſummoned, the defendant might have had influence enough to obſtruct juſtice, and ſo that place not indifferent.

But the *venire* muſt be from ſome known place, where the fact is ſuppoſed to be done, as in the 6 Co. 14. Co. Lit. 125. 2 Rol. 620.

† According to the annotiſt, the doctrine laid down in this and the three preceding paragraphs is calculated to countenance the modern practice of altering the *venue*, which is a flagrant encroachment on the ancient rights of the decennary.

the contracts of the ſame actions ariſe, and by that act it is ordained, that if from thenceforth a vill, caſtle, manor, or foreſt; becauſe, if it was not a known place, there could be no proper direction to the ſheriff, (which the judges muſt intend is known to the ſheriff) to try who were the *pares* that were to try that fact; therefore a ſtreet
* Page 87. or * lane is no proper place for a *venue*, becauſe it is not ſuppoſed to be ſufficiently known to the ſheriff in what hundred it is; but a ſtreet in a pariſh is a proper *venue*, becauſe the pariſh is ſufficiently known in what hundred it is.

Co. Lit. 125. 2 Roll. 616. But if they plead *nul tiel ville*; as ſuppoſe a treſpaſs laid in *Dale*, and they pleaded *nul tiel ville de Dale*; or if the action of a man be laid in *Dale*, and *nul tiel ville* pleaded, it muſt of neceſſity be tried by the *pares comitatus*; becauſe, if there be really no ſuch place as the plaintiff has laid in his count, then there is no particular hundred choſen by the plaintiff, out of which any
Hob 89. *pares* ſhould come to try it; and ſo where the plea is in abatement of the writ, the place choſen by the plaintiff in the county to try the cauſe is not material; and therefore *de corpore comitatus*. So if a miſnomer in the name or title of dignity is to be tried, it ſhall be tried in the county at large, becauſe there likewiſe the place in the count is not material; but if an action be brought for a treſpaſs done in *Sale* or *Dale*,
Co. Lit. 225. 6 Coke 14. 1 Bulſt. 127. 22 Ed. 4. 4. and the defendant denies there is any ſuch place, this ſhall be tried *de vicinet' de Dale*, becauſe this is to the count; where the plaintiff has choſe a *venue* from two places, and one being confeſſed, he ſhall have his judgment of the fact in iſſue
* Page 88. from that place, and the * rather, becauſe the men of *Dale* are to aſſeſs the damages in the action; and this plea cannot be executed as amounting to the general iſſue, becauſe it is touching the *venire* in that iſſue.

If

If the declaration contains matters lying in two counties that join, or an annuity, if a manor is in one county, and ſeiſin in another, and the poſſeſſion is traverſed, this ſhall be tried by both counties, as appears by the 7. *R.* 2. *c.* 10. becauſe the ſheriffs may be ſuppoſed to meet on the bounds of each county, and impanel the *pares* there; but if the counties cannot join, and conſequently the ſheriffs cannot meet each other in order to impanel, as if the iſſue were, whether a road from *London* to *York*, and from *York* to *London*; this may be tried in either county; where the matter is local, and the *venue* cannot be from a place where it is laid, therefore for apparent impartiality it muſt be from the next hundred; as if an action be brought on the *ſtatute* of *Winton*; for the proper *pares* for the trial of every fact are the neareſt impartial men to the place where the fact was done. 2 Roll. 601. 2 Roll. 603.

But by the *ſtatute* for the amendment of the law the *venue* is to be awarded *de corpore com'* unleſs in indictments, appeals, and proſecutions. *c.* 16. 4 Ann. *London* is a county.

* The law having ſettled the diſtinction between local and tranſitory actions, it ſeems, that towards the 6th of *R.* 2. it was abuſed to vexation; for plaintiffs would lay their actions far from the place where the fact was done, ſo that the defendant was neceſſitated to carry his witneſſes into that county, how far ſoever from that place, where the fact was done: to prevent this, 6 *R.* 2. *c.* 2. preſcribes; to the intent that writs of debt and account, and all other ſuch actions, † be from thenceforth taken in their counties, and directed to the ſheriff of the counties, where in pleas on the ſame writs, it ſhall be derived that the contract thereof was made in another county * Page 89.

† The words "all other ſuch actions" allude to the 25 *Ed.* 3, *c.* 17. which ſee.

county than is contained in the original writ, that then incontinently the ſaid writ ſhall be abated.

This was intended to have confined all actions to their proper counties, but then it would have created greater miſchief than it was deſigned to have prevented, if a plaintiff could not have followed his debtor into another county; but the ſtatute is ſo worded, that it only preſcribes, that the count ſhould agree with the writ in the place, which did not make the tranſitory actions local; but to obviate the inconvenience, the judges conſtrued ‡ it to impower them to change the *venue*; and therefore in all caſes, unleſs of ſpecialty, the court will

‡ The annotiſt ſays, that "this conſtruction is the moſt bare-faced diſtortion of the ſtatute that can poſſibly be conceived: for although the word "*narratum*" be mentioned in this ſtatute, yet, as the *declaration* muſt not vary from the writ itſelf, it neceſſarily follows that the contract in queſtion muſt not have been made in any other county than that which is contained in the original writ, or that if it be in any other county, *tunc in continenter breve illud penitus caſſetur.*" for this ſtatute of 6 *R.* 2. *c.* 2. is nothing but a renovation or confirmation of the 31ſt *cap.* of our firſt Henry's laws which runs in the following words "*unus quiſque per pares ſuos judicandus eſt, et ejuſdem provinciæ* peregrina *vera judicia modis omnibus ſubmovemus.*"

In purſuance of this law of Henry the firſt, when he by charter erected the city of London into a county of itſelf, he granted, in proof of its being a diſtinct county, that the citizens of London ſhould not plead without the city-walls concerning any plea whatever, and at this very day, a foreign plea is within the city of London a good plea in abatement of a writ, where the cauſe of action ariſes on contract or accompt. *ſed qu.*

Beſides theſe incontrovertible proofs of the judges having miſconſtrued the 6th of R. 2d. above-mentioned, let the reader turn to *Britton* (ſection 104) and he will there learn that a *foreign* plea was one of the uſual and cuſtomary pleas in action of treſpaſs, and did by no means authorize the judges to change the *venue*. The words of *Britton* are "*et come les defendants ſeront en court & auront* oye *pleyntyfs counter vers eux, les memes defendants ſe pourront aider* pur exception de Breve purchaſe en autre counte que par la on le fait duiſt eſtre fail."

(Tho' the annotiſt may be right, as to what the antient law and practice was, yet in theſe reſpects the ſame have been of late much changed, and the adminiſtration of juſtice is free and impartial, unclogged with many ſubtle niceties which were formerly a diſgrace to our laws and police.)

will change * the *venue* to the place where the fact was done; and if the plaintiff again prays it may be changed back again, then they *non-pros'd* the plaintiff in such cases, unless he gives some evidence of the fact within the county, where the writ is brought; and these rules are good, since they tend in effect to abate the writ according to the statute. * Page 90.

But in cases of specialty they did not change the *venue*, because, if the contract was not dated at a particular place, it was presumed so to be admitted by the parties that it might charge the defendant in any place; and the very form of *noverint universi* seems to be calculated, that it should be taken as a contract in all places whatsoever; and therefore it would take away one of the benefits of his specialty to confine him to sue it in the county where it was executed. In an action of *scandalum magnatum* † the court will never change the *venue*; because a scandal raised of a peer of the realm reflects on him through the whole kingdom, and he is a person of so great notoriety, that there is no necessity of his being tied down to try his cause among the neighbourhood. 1 Lev. 50.

* The action for rent in the *detinet* against an executor shall be brought where the lease was made, because it is for arrears in the testator's time; but where it is in the *debet* and *detinet* for rent accrued in the executor's time, it must be where the land lies. * Page 91. 1 Vent. 286.

But

† When this statute passed, it was a rule, that a magnas might by judgment of *parliament* be divested of his baronage either for want of estate to keep up his dignity, or for other cause that made him infamous. Therefore a *horrible lye* that was told to his so great prejudice deserved a signal punishment. Thus it should seem that *scandalum magnatum*, as it might eventually divest him of his baronage, ought to be taken as and for a *local* and not a *transitory* action, consequently (according to the annotist) the court ought to change the *Venue*, and the cause be tried in the neighbourhood where the cause of action arises. Vide p. 84.

But if iſſue be joined, then it cannot be altered, becauſe it is agreed to by the defendant.

The alteration † began in *B. R.* where they could eaſily change the *venue*, where the uſual proceſs is by bill of *Middleſex* and *latitat*; but it was more difficult in the *C. B.* becauſe they muſt have an original to warrant their proceedings; their firſt method of doing it was by obliging the plaintiff to make an original *capias*, where the action accrued, and a *teſtatum* where the defendant might be found; this method ‡ proved chargeable, tedious and inconvenient; and therefore they changed the *venue* and the record, and allowed them to file an original to warrant the new declaration, as the practice ſtands to this day.

If the plaintiff, after iſſue joined, neglected to try the cauſe the firſt aſſizes in the country, or the firſt term in *Middleſex* or *London*, the defendant was at liberty to bring down the cauſe by a *proviſo*, ſo called by the clauſe in the *venire fac'*, which ſays, * *proviſo ſemper quod ſi duo brevia inde tibi venerint unum eorundem tantum retor' & exequaris*; for both the plaintiff and defendant having put themſelves upon their *pares*, the plaintiff's laches ſhall not prevent the defendant's diſcharging himſelf from the action; and therefore the proceſs is open for him, as well as the plaintiff; if the judge receives an imperfect verdict, there can be no further proceſs againſt the ſame jury, becauſe they are diſcharged by the acceptance of their verdict; and therefore in this caſe there

* Page 92.

† This alteration, or rather innovation (the annotiſt ſays) began in the *King's-bench* in the laſt century only, and is one of the bleſſed fruits of the *latitat & ac etiam*.

‡ This method, tho' chargeable and inconvenient enough, is not the true cauſe of the *Common Pleas* changing the *venue* and the record, and allowing them to file an original to warrant the new declaration: the real and true cauſe may be ſeen in the Life of Lord *Guilford*.

there must be a *venire fac' de novo* to give a more perfect verdict; but because the same jury often are at several assizes on the continuance of the jury process, therefore by the *statute* of 7 & 8 *W.* 3. *c.* 32. a *venire facias de novo* is given, if the cause be not tried the first assizes.

By 35 *H.* 8. *c.* 6. to prevent the delay of the *decem tales*, it is enacted, there shall be a *tales de circumstantibus*, which is returned by the sheriff in court.

---

* CHAP. VIII.

* Page 93. Facon juries (E.)

The Challenge.

WE are now come to the challenge; and of old the suitors in court, who were judges, could not be challenged; nor by the feudal law could the *pares* be even challenged, *pares qui ordinariam jurisdict' habent recusari non possunt*; but those suitors, who are judges of the court, could not be challenged; and the reason is, that there are several qualifications required by the writ, (*viz.*) that they be *liberos & legales homines de vicineto* of the place laid in the declaration, *quorum quilibet habeat decem libras terrarum, tenementor', vel reddit' per ann' ad minus per quos rei veritas melius sciri poterit, & quod nec* the plaintiff, *nec* the defendant, *aliqua affinitate attingunt, ad faciend' quondam jurat' patriæ inter partes prædictæ*; these qualifications were inserted, because this manner of trial was different from below; for there the trial being by all the *pares*, if there was a majority amounting to twelve, the cause was decided by such a number as was necessary; but here, because they brought up only twelve, and therefore they were all to be of one * mind in order to make the verdict; * Page 94.

verdict; therefore it was neceſſary there ſhould be ſeveral qualifications mentioned in ſuch perſons, who are to give in the verdict in that cauſe; and if any of the qualifications were wanting in any one, it was ſufficient reaſon to reject ſuch perſon. The firſt is, that they ſhould be *liberi & legales homines*; and therefore villains, outlaws, excommunicated perſons, and aliens were excluded; the next was *de vicineto*; and therefore originally they were to be of the ſame hundred; but afterwards, they required only ſix. 48 *Ed.* 3. 30. 48 *Aſſ.* 5. Afterwards only four. 7 *H.* 4. 46. 28 *Ed.* 4. 49. they were ſettled at ſix; for the difficulty of getting hundredors, and the partiality they found amongſt them, the neighbours having generally a particular attachment to one party more than the other, made the judges willing to contract the number; but by 35 *H.* 8. *c.* 6. and by 27 *El. c.* 6. two only were neceſſary; but if the lord of the hundred be a party, then it is ſufficient they ſhould come from the next hundred; and now by the *ſtatute* for the amendment of the law, the jury comes *de corpore comitatus*.

Raſt. 118. a. b.

The next qualification, *Quorum quilibet habeat decem libras terrar' ten'or', vel reddit' per annum ad minus*, by *Weſtm.* 2. *c.* 28. * they were to have 20*s.* *per ann.* if the aſſize were within the county; and 40*s.* if without. By 21 *Ed.* 1. *ſtat.* 1. they were to have 40*s.* *per ann.* within, and 100*s.* without; by the *ſtat.* 2 *H.* 5. *cap.* 3. they were to have 40*s.* in caſe of death; or where the diſpute was for above 40 marks; by 1 *R.* 3. *c.* 4. a juror in the torn was to have 40*s.* freehold, and 26*s.* 8*d.* copyhold; by 35 *H.* 8. 6. it is increaſed to 4*l.* and by 4 & 5 *W. & M.* it is ordered, that all jurors, other than ſtrangers *per medietatem linguæ*, ſhall have 10*l.* *per ann.* but there is a ſaving to cities and boroughs; and by 4 *H.* 8. *cap.* 3. a citizen of *London* worth 100 marks

* Page 95.
Raſt. 118. a. b.

marks in goods ſhall be a good juror: it ſeems, that in corporations the freedom and not the freehold makes them *liberos homines*.

The next is a *per quos rei veritas melius ſciri poterit & quod nec* the plaintiff, *nec* the defendant, *aliqua affinitate attingunt*; all cauſes of objection from partiality or incapacity, conſanguinity and affinity, are contained in the writ; if the juror be under the power of either party, as if counſel, ſerjeant of the robes, or tenant, theſe are expreſly within the intent of the writ; ſo that if he has declared his opinion touching the matter, or has been choſen arbitrator by one ſide, or done any act, by which * ſuch an opinion might be conceived, as if he has eaten and drank at the expence of either party after he is returned; all incapable perſons, as infants, ideots, and people of *non ſane* memory, are likewiſe excluded.

But it is no principal challenge that the juror was commiſſioner for the plaintiff to examine witneſſes, becauſe he is made commiſſioner by the king; but otherwiſe being arbitrator, becauſe created by the parties themſelves. 9 Co. 71.

* Page 96.

But where the juror is not under a biaſs on either ſide, or if he has not given apparent marks of partiality; yet there may be ſufficient reaſon to ſuſpect he may be more favourable to one ſide than the other; and this is a challenge to the favour; as if the juror's ſon has married the plaintiff's daughter, becauſe this is not contained within the words of the writ; therefore no principal cauſe of challenge, but only to favour; becauſe ſuch juror is not within the power of the party; and in theſe inducements to ſuſpicion of favour, the queſtion is, whether the juryman is indifferent as he ſtands unſworn; for a juryman ought to be perfectly impartial to either ſide; for otherwiſe his affection will give weight to the evidence of one party; and an honeſt, but weak man, may be as much biaſſed, as to think he goes by his evidence, when his affections add weight to the evidence; now ſince the writ expects thoſe by whom the truth may be beſt known, it excludes all thoſe who are apparently partial, without any trial, becauſe they are not under the qualifications in the writ, ſince the * truth cannot be known

Difference between challenge principal and to favour. Co. Lit. 156. a.

* Page 97.

known by them; but where the partiality is not apparent, but only ſuſpicious, and the juror is to be tried whether favourable or not, and if the triers think he is, then he is to be excluded; and this examination is by two perſons ſworn to try the truth of the matter; as all trials touching the ſummons, where it was deſired, were by two perſons, this being whether ſuch perſons deſcribed in the writ were warned.

The laſt qualification is *ad faciend' quandam jurat' patriæ*; from hence it is that peers are excluded, for they are not *pares patriæ*, but *pares* of an higher rank; but if a peer be impleaded by a commoner, yet ſuch cauſe ſhall not be tried by peers, but by a jury of the country; for though the peers are the proper *pares* to a lord of Parliament in capital matters, where the life and nobility of a peer is concerned, yet in matter of property, the trial of fact is not by them, but by the inhabitants of thoſe countries where the facts ariſe; ſince ſuch peers, living through the whole kingdom, could not be generally cognizant of facts ariſing in ſeveral counties, as the inhabitants themſelves where they are done: but this want of having noblemen for their jury, was compenſated as much as poſſible, by returning perſons of the beſt quality; * therefore a knight is neceſſary to be ſummoned in any cauſe where a peer is party.

See p. 84, 90.

As they had thoſe challenges to the polls, ſo likewiſe had they to the returning officer, if he was partial, for this reaſon, that all the *pares* did not come, but only twelve, which were ſelected by the ſheriff; and therefore he ought to be as impartial as the perſons returned; and the court, who were to ſee that an impartial perſon brought up the twelve, received all challenges to their officer, and they thought there could be no better rule to aſcertain what ſhould be a proper challenge to the officer than that which was allowed to each juror's partiality; for they did not

* Page 98.
Raſt. 116. and judgment *quod pannellum quaſſetur.*

not ſuppoſe, that they had a jury *per quos rei veritas melius ſciri poterit*, unleſs they were ſelected by a perſon indifferent: therefore if there was conſanguinity or affinity continuing between the ſheriff and either of the contending parties, or was in their power, or had declared his opinion on either ſide, or had not returned an hundredor; theſe were principal cauſes of challenge to the ſheriff; ſo likewiſe if the ſon of the ſheriff was married to the daughter of either of the parties, *&c.* Raſt. 116. Raſt. 118.

There were likewiſe challenges to the favour in the ſame manner as to the juror, for the reaſon before-mentioned. Raſt. 117. b. Poſt.

* But if the ſheriff returns a panel of jurors, ſtruck by two ſtrangers that favour neither of the parties, this is a good array, and ſhall not be quaſhed; and therefore it is common for the officers of the court, by the direction of the judges, to give a panel to the ſheriff, which he returns; ſo the court ſeems to have power to compel the ſheriff to make his return; but they can fine him if a ſufficient jury does not appear, according to the precept of the writ. * Page 99.

Before we conclude we muſt obſerve, that in capital caſes, at common law the priſoner could challenge thirty-five peremptorily; and this was becauſe the trial by the petit jury came inſtead of the *ordeal*; the petit jury of twelve being after the manner of the canonical purgation; and becauſe the whole *pares* were not upon the jury, but only a ſelect number was brought in and choſen by the criminal himſelf, as was uſual among the canoniſts, therefore they took a middle way, and gave the defendant liberty to challenge peremptorily any number under three juries, four juries being as many as generally appeared to make the total *pares* of the county. Raſt. 119.

38 *H.* 8. *c.* 3. They were reduced to twenty, which in felony is ſtill in force, but by 1 *&* 2 *W.* *&* *M.*

& *M.* c. 10. the challenge of thirty-five in treaſon and petit treaſon is reſtored.

* Page 100. * But a peer cannot challenge any of his peers, becauſe the whole peers ſit upon him, who are his proper judges.

But 15 *Ed.* 3. in the caſe of *John Stradford* archbiſhop of *Canterbury*, the houſe of lords appointed twelve, *viz.* four biſhops, four earls, and four barons, to try him for high treaſon; which gave an opportunity to the king, out of parliament, to appoint a leſs number than the whole body of the peerage to try a peer, for one precedent may not eſtabliſh a right of trying the biſhops by the peerage, ſince there were contrary precedents; and the caſe of a biſhop does not relate to the blood and nobility of the peerage; but this prerogative is taken away by 7 *W.* 3. *cap.* 3. and the old law is reſtored.

Juror challenged himſelf as exempted, *Raſt.* 117.

---

* Page 101.

*CHAP. XI.

Of Pleas Puis Darreign Continuance.

AT common law, no plea could be determined but in the preſence of the parties, unleſs default was made by one of them; and therefore by the *ſtatute of Weſtminſter* 2. *c.* 28. to ſave delays at the *niſi prius*, they ordered that the inqueſt ſhould be taken, though the defendant made default and did not appear; from hence it became neceſſary, after iſſue joined, that there ſhould be continuance from time to time till the verdict was taken; as before iſſue joined a *li. lo.* was given the defendant from term to term till his plea was put in; and if theſe continuances were not entered

tered from term to term, the defendant was without day in court, and wherever he was ſo, there was an end of proceeding in that writ, for he had fulfilled the command of the writ in appearing, and the court might give judgment againſt him if he did not plead; and if the court neither gave him leave to plead, nor gave judgment againſt him for want of a plea, he having fulfilled the writ, the matter was at an end; ſo if * he had pleaded, and the court had not given a day to the parties to prove their allegations, there likewiſe, the defendant having appeared, the writ was complied with, and the matter was at an end, unleſs the court gave further time to verify the allegations; and therefore, in ſuch caſes, there muſt be continuances till the verdict; ſo upon demurrer, or after verdict given, if the court take time to conſider of their judgment, they muſt give day to the parties; becauſe they can determine nothing in the abſence of the parties; and the command of the writ being complied with by the defendant's appearance, and the effect of the writ being anſwered, it is at an end; and the court can give only from one term to another; for if they could give day to a ſecond term, they might give to a 5th, 20th, or 100th, and they would have power to delay *ad infinitum*, the defendant could give but one plea in bar, and on that, if there was an iſſue (or demurrer) the cauſe was determined, becauſe there could be but one verdict in a cauſe; but if any new matter had happened pending the writ, he might plead it after a former plea pleaded, provided he pleaded it before the next continuance, becauſe, ſuch matter being new, it was not in his power to plead it when his former plea was pleaded; and it would be hard, becauſe * he had pleaded, to exclude him from any advantage which he had not at the time of pleading, ſince there was no laches in him; but this he cannot plead after a continuance, becauſe,

* Page 102.

2 Danv. 151. Stil. 239. *cont.* 1 Bulſ. 144

* Page 103.

cauſe, having ſuffered the former plea to continue, he reſts upon it, and waives the benefit of any new matter; if a releaſe be given after the *niſi prius*, and before the day in bank, he cannot plead it, for there is a verdict already in the cauſe, and upon another plea; and therefore the caſe is determined: ſo that he is put to his *audita querela* to hinder the execution of his judgment.

21 H. 6. 10. Bro. *cont.* 27. 2 Lut. 1143. *Idem* 1174.

But there are two caſes wherein a man may plead, though it be after the laſt continuance, *viz.* outlawry, and the death of the plaintiff; as to the outlawry, it is upon the prerogative, that the debt itſelf is forfeited to the king, and by virtue of the prerogative *nullum tempus occurrit regi*; and therefore he may plead it, though a continuance has happened after the outlawry; ſo he may plead the death of the plaintiff, becauſe though a continuance has been entered, yet that continuance is a nullity, becauſe there was no plaintiff in being when day could be given; ſo it may be pleaded if the plaintiff died after the day at *niſi prius*, and before the day in bank; and the reaſon is, that if there is no cauſe in court, * no judgment can be given for a perſon that is not *in rerum naturâ*, and if it be given it is erroneous; and if the plaintiff's attorney will traverſe that plea, he cannot ſay the plaintiff comes *per attorn'*; becauſe that would be to forejudge the matter in iſſue; but the attorney by his name, *viz.* J. S. *venit pro magiſtro ſuo & dicit.*

1 Salk. 178. 21 H. 6. 10. Bro. *cont.* 27. 1 Lev. 80. 1 Sid. 93, 114, 118, 185, 2 Lut. 1143, 1174. 1 Sid. 93. * Page 104.

But a releaſe, as I conceive, may be pleaded, though there hath been imparlance between; becauſe there is no continuance of a former plea pleaded, and by the *libertas loquendi*, the defendant has time given to plead what makes moſt for his advantage.

15 Ed. 4. 4. Bro. *cont.* 31.

But if the writ be only abateable, as if the plaintiff be made a knight, or the plaintiff being *feme ſole* takes a huſband, it muſt be pleaded after the laſt continuance; for otherwiſe he depends on

2 H. 6. 13. 1 Sid. 143.

on his firſt plea, and waives the benefit of his new matter; but it cannot be pleaded between the day at *niſi prius* and the day in bank, becauſe there has been trial in the ſame cauſe before.

But if the leſſor of the plaintiff dies, this cannot be pleaded *puis darreign continuance*; becauſe the right is ſuppoſed in the leſſee. Hob. 5.

Time and place for the *venue* muſt be laid in this, as in all other pleas. 2 Lut. 1143. Allen 66.

* The pleas are twofold, *viz.* in abatement, and in bar; if any thing happens pending the writ to abate it, this may be pleaded *poſt darreign continuance* though there is a plea in bar; for this can only waive all pleas in abatement that were in being at the time of the bar pleaded, but not ſubſequent matter; but though it be pleaded in abatement, yet after a bar is pleaded it is peremptory, as well on demurrer as on trial; becauſe, after bar pleaded, he has anſwered in chief, and therefore can never have judgment to anſwer over. 5 E. 4. 149. * Page 105. Allen 66. 5 E. 4. 139. and it is a waiver of the bar, and no advantage ſhall be taken of it. 1 Salk. 178.

So it may be pleaded in bar; but whether it be pleaded in abatement or in bar, in the firſt place it muſt be pleaded *quod breve caſſetur*, and the other *quod actionem ulterius manutenere non debet*, and not that the former inqueſt ſhould not be taken; becauſe it is a ſubſtantive bar in itſelf, and comes in the place of the former, and therefore muſt be pleaded to the action.

There can be but one plea *puis darreign continuance*, that the plaintiff may not be delayed *in infinitum*; for if he made a ſecond change, he might have made a third, and ſo *in infinitum*: but ſome have held, that he might plead an outlawry after the laſt continuance, becauſe *Nullum tempus occurrit regi*; but *quære*, whether the ſubject ſhall after plea *puis darreign continuance* partake * of the prerogative, or whether it ſhall be preſumed, after ſuch trifling, that it is frivolous and untrue, and therefore rejected. Bro. *cont.* 405. Fitz. *cont.* 5. 1 Salk. 178. * Page 106.

Moor v. Green. It need not be pleaded *puis darreign continuance.* Bro. *cont.* 2. 26 H. 8. 2. Yelv. 140.

If a matter happens after plea pleaded, and before iſſue joined, it ſhall be pleaded to be done pending the writ; but if it happens after iſſue joined, it ſhall be pleaded *poſt ultimam continuationem.*

If the plaintiff releaſe the defendant after the award of the *niſi prius*, and if on the day of the *niſi prius* the jury remains *proper delictum*, the defendant may plead it at the day in bank; becauſe the cauſe was not determined by the jury; and therefore he is at liberty to plead it as at any other day of continuance; and it may be tried by the jury when they appear.

If the plaintiff after a writ of inquiry awarded, releaſe the defendant, he cannot plead this releaſe at the day in bank, becauſe there is no day given him, and judgment is already given; but if the plaintiff dies, ſuch death may be pleaded, becauſe there is no perſon in court to whom judgment can be given; but now by the 8. *W.* 3. *cap.* 10. the executor, *&c.* may have a *ſcire fac'* on ſuch an interlocutory judgment.

---

* Page 107.

*CHAP. X.

Of Amendments at common law, and by the ſtatutes, and objections to the uncertainty of declarations.

WE are now come to motions in arreſt of judgment; and here it is to be noted, that matter amendable, and matter of form, as the law now ſtands, will not arreſt judgment; and therefore it is neceſſary to know what is amendable, and what not, what matter of form, and what matter of ſubſtance.

At common law there was very little room for amendments; and this was from the original conſtitution

tution of the courts, as it appears by *Britton*; for the judges were to record the parolls deduced before them in judgment, and *Britton* says, in the perſon of *Ed.* 1. we have granted to our juſtices to record the pleas pleaded before them, becauſe we will not ſuffer their record to be a warrant to juſtify their own miſdoings, nor that they eraze their words, nor amend them, nor record againſt their enrollment. This ordinance of *Ed.* 1. was ſo rigidly obſerved, * that when juſtice *Ingham* in his reign, moved with compaſſion for the circumſtances of a poor man who was fined 13*s.* 4*d.* erazed the record, and made it 6*s.* 8*d.* he was fined 800 marks, with which a clock-houſe at *Weſtminſter* was built, and furniſhed with a clock; yet notwithſtanding there were ſome caſes that were amendable at common law. Brit. 2. * Page 108. 3 Inſt. 72.

Firſt, all miſtakes were amendable the ſame term, becauſe it is a roll of that term, and even a new roll might be brought in the cauſe, and conſequently the ſame roll may be amended. 8 Co. 157.

Secondly, that part of the count which records the writ was amendable at common law, though of a ſubſequent term, as *South* for *Southampton*, without a tittle or daſh, was amended at common law, becauſe the recording of the writ was ſurpluſage; and by the law, which conſtitutes the court, they were not to record againſt a former record with the writ; and therefore the court by that conſtitution was obliged to ſet ſuch miſpriſions right. 1 Saund. 317. Vide *poſtea* Brit. *ubi ſupra.*

Thirdly, an eſſoin, if the plaintiff's name were miſtaken, or an eſſoin made as guardian, when there was no guardian in the writ, this was amendable at common law; becauſe ſuch an eſſoin was contrary to the writ, and conſequently they * by ſuch inrollment would contradict a former record. 2 H. 4. 4. F. *Amendment* 7, 61. 8 Co. 156. B. *Amendment* 26. * Page 109.

Fourthly, continuances could be amended at common law, as *A.* brought a bill againſt *B.* who vouches 6 E. 3. 25. F. Amendment 73.

vouches *C.* who enters into warranty, and pleads to iſſue, a *ven fac'* and a *jurat' inter A. & B.* which *jurat'* ought to have been *inter A. & C.* becauſe it appears by the record of the iſſue, and the *venire* itſelf, that the *jurat'* ought to be between *A* and *C.* this is amended, becauſe it was an inrolment againſt a former record.

41 E. 3. 6. F. Amendment 19. 8 C. 156.

Fifthly, in the caſe of the king they amended the writ, where the fault was in the form, as in a *quare impedit* brought by the king, the writ was *præſentere* inſtead of *præſentare*, and it was amended; for they ſuppoſed, that the original conſtitution of the court was not to deſtroy the prerogative of the king; this conſtitution of *Ed.* 1. was found to be very inconvenient, becauſe the court being tied down ſo ſtrictly not to alter their records after the firſt term, ſeveral judgments were reverſed by the miſpriſion of their clerks in proceſſes; wherefore 14 *E.* 3. *c* 6. the juſtices had liberty on the challenge of the party to amend the proceſs, where the clerk had miſtaken one ſyllable, or letter; and the judges afterwards conſtrued the ſtatute ſo favourably to * ſuitors, that they extended it to a word; † but they were not ſo well agreed, whether they could make theſe amendments, as well after as before judgment; for they thought the authority touching that plea was determined by the judgment; and therefore to put an end to the diverſity of opinions by 9 *H.* 5. *c.* 4. it is declared, that the judges ſhall have the ſame power, as well after as before judgment, as long as the record in proceſs is before them; this ſtatute is confirmed by 4 *H.* 6. *cap.* 3. with an exception,

* Page 110.

† That is to ſay, (according to the annotator) the judges arbitrarily ſet themſelves or their interpretation, clearly *above* the law. For neither the letter nor the ſpirit of the 14th of *Ed.* 3. *c.* 6 extended to a *whole word*, as appears by the ſtatute itſelf, *pur mes-prendre en enſcrivant* une lettre *ou* un ſilable *trop ou trop peu*." (It was a liberty taken for the good of the ſubject, and thouſands have felt the benefit of it.)

exception, that it ſhall not extend to proceſs on outlawry.

Though the ſtatute gave the judges a greater power than they had before, yet it was found, that they were too much crampt, having authority to amend nothing but proceſs, and they did not conſtrue this word in a large ſignification, to comprehend all proceedings in real and perſonal actions, and in criminal and common pleas, but confined it to the meſne proceſs and jury proceſs; wherefore, to enlarge the authority of the judges, 8 *H.* 6. *cap.* 12. gives them power, by them and their clerks, to amend what they ſhall think in their diſcretion to be the miſpriſion of their clerks in any record, proceſs, and plea, warrant of attorney, writ, panel or return; *per* 8 *H.* 6. *c.* 15. the judges may amend the miſpriſion of * their clerks, and other officers, as ſheriffs, coroners. *&c.* in any record, proceſs, or return before them, by error or otherwiſe, writing a letter or ſyllable too much or too little. As the ſtatutes only extended to what the juſtices ſhould interpret the *miſpriſion* of their clerks, and other officers, it was found by experience, that many juſt cauſes were overthrown for *want* of form, and other failings, not aided by this ſtatute, though they were good in ſubſtance; wherefore for the further relief of ſuitors, the 32 *H.* 8. *c.* 30. it is enacted, that after verdict judgment ſhall be given according to the verdict, notwithſtanding any miſpleading, lack of colour, inſufficient pleading, or jeofail, miſcontinuance, diſcontinuance, miſconveying of proceſs, misjoining of the iſſue, lack of warrant of attorney of the party againſt whom the iſſue ſhall be tried, or other negligence of the parties, their counſellors or attornies: this ſtatute, tho' much more extenſive than the other, and though it very much enlarged the authority of the judges in amendments in miſtakes; yet it remedied no omiſſion, but that the parties own neglect

* Page 111.

neglect in not filing his own warrant ſhould not after verdict prejudice the right of the party that had prevailed; therefore to remedy the omiſſions, which the prevailing party might be guilty of, as * well as the other ſide, by 18 *El.* *c.* 14. after verdict no judgment ſhall be arreſted for want of form, falſe *latin*, variance from the regiſter, or other faults in form, in any writ original or judicial, count, declaration, plaint, bill, ſuit, or demand, or for want of any writ original or judicial, by reaſon of any imperfect or inſufficient return of any ſheriff, or other officer, or for want of any warrant of attorney, or for any fault in proceſs upon or after any prayer in aid and voucher.

* Page 112.

Theſe ſtatutes were only extended to the courts above; but the ſubſequent ſtatutes carry to all courts of record, and remedy ſeveral defects and omiſſions not included in the former jeofails; this was made 21 *Ja.* 1. *c.* 13, and ordains, that after verdict no judgment be ſtopped for variance in form only between the original or for lack of averring any life, ſo it be proved they are living; or becauſe the *venire*, *habeas corpus*, or *diſtringas* was awarded to a wrong officer upon any inſufficient ſuggeſtion; or for that *venue* is in ſome miſawarded, or ſued out of more or fewer places than it ought to be, ſo as ſome one place be right named; or for miſnaming any of the jurors in ſurname or addition in any of the writs, or returns thereof, ſo as they * be proved to be the ſame man as was meant to be returned; or for that there is no return on any of the writs, ſo as a panel of the names of jurors be returned and annexed thereto; or for that the ſheriffs or other officers name is not ſet to the return of ſuch writ; ſo as it appears by proof, that writ was returned by them; or for that the plaintiff in ejectment, or other perſonal action, being under age, appeared by attorney, and the verdict paſſed

* Page 113.

paſſed for him. The main deſign of this ſtatute was to help any miſtake in the jury proceſs; but there were ſeveral things ſtill to be ſupplied, and ſeveral others to be adjudged form, which were always conſtrued to be matters of ſubſtance, and conſequently not aided by any of the former ſtatutes: wherefore 16 & 17. *Car.* 2. *c.* 8. was made the act, which *Twiſden* called the omnipotent act, which enacts, that after verdict no judgment ſhall be arreſted for want of form, or pledges returned on the original; or for want of the ſheriff's name, or for want of pledges upon any bill or declaration, or for want of any *profert*, or for want of *vi & armis & contra pacem*, or for the miſtake of any name, ſum, day, month or year, in any pleading, being right before, and to which the plaintiff might have demurred ſpecially; nor for want of *hoc parat' eſt verificare*, or *verificare per record'* or *prout patet per record'*, or for want of right *venue*, ſo as the trial was by a jury of the proper county or place where the action was laid; nor judgment after verdict, *cognovit actionem*, or *relicta verificatione*, be reverſed for want of *miſericordia* or *capiatur*, or one entered for the other; or *ideo conceſſ. eſt per cur'*, for *conſiderat' eſt*, &c. or for that the increaſe of coſts after verdict in any action or nonſuit in replevin are not entered to be at the requeſt of the party, for whom the judgment was given; or that the coſts in any judgment whatſoever are not entered to be by conſent of the plaintiff; and all ſuch omiſſions, variances, and defects, and other matters of like nature, not being againſt the right of the matter of the ſuit, and whereby the iſſue nor trial are altered, ſhall be amended where ſuch judgment is given, or ſhall be removed by writ of error. * Page 114.

The plaintiff declares, and the defendant pleads, and the plaintiff replies, and the defend-

ant

ant demurs, and the plaintiff joins in demurrer; the queſtion was, whether the plaintiff ſhould amend his declaration? And the true diſtinction upon the debate of the judges at *Serjeant's inn* ſeemed to be this, that where there is a demurrer, and joinder in demurrer, if the cauſe be ſtill
* Page 115. in paper, * upon paying of coſts, and giving the defendant liberty to alter his plea, the plaintiff may be at liberty to amend; becauſe the pleading in paper came in only inſtead of the antient way of pleading *ore tenus*; and in the pleading *ore tenus* the record was only in *fieri*; and therefore, though a man had joined in demurrer, he might come before that was entered on record, and pray to withdraw his demurrer, and amend; but after the pleadings were entered on record of the ſame term, then it could not be amended or altered; this upon the conſtitution of *Ed.* 1 which forbids judges to alter or change any of the records or rolls of the court: and therefore no alteration can be made in a record, unleſs it be in the ſame term, whilſt the record is ſuppoſed to be in *fieri*; but out of this rule we muſt except all amendments made by virtue of the *ſtatute* of jeofails; for thoſe enable the courts to amend at any time within the purview of ſuch ſtatutes.

M. 8 Rep. Strange 1150. p. 10. Geo. Pruſſet v. Martin ibid. Thorpe.

In the *King's Bench*, declaration on a bail-bond the *memorandum* was of *Trinity term*, and the aſſignment was not till *November* following: and it was objected, that the plaintiff of his own ſhewing had no cauſe of action at the time of the action brought, the plaintiff prayed to amend; and it was
* Page 116. objected, that there was nothing to * amend by; but the court gave them leave to file a new bill as of *Michaelmas* term, which is inſtead of the original writ, and to amend the *memorandum* by that bill.

In all the ſtatutes of amendments from 8 *H.* 6. there is an exception for appeals, indictments of high treaſon, and of felonies.

It

It has been a great queſtion, whether any of theſe ſtatutes extend to the caſe of the king, or party, either to remedy the parties, where the party has prevailed againſt the king, or the king againſt the parties; and in both caſes it has been ruled that theſe ſtatutes do not extend to the king; for there only indictments, appeals, and informations on penal ſtatutes, are mentioned: yet becauſe the firſt ſtatute ſays, it ſhall be amended on the challenge of the party, in which the king with *decennary* cannot be included, the ſubſequent ſtatutes are ſuppoſed to be made on the ſame platform, and this exception, only *abundante cautela*; thus in a *quo warranto*, where the defendant claims a warren, and the defendant preſcribes for a warren within the manor of *Ridge*; and the *venire* was awarded from the *villa* of *Ridge*, and not from the manor of *Ridge*; and a verdict for the defendant; the court awarded a new *venire fac'*, becauſe they held the king was not within* the *ſtatute* 21 *Jac.* So in an information for a ſeditious libel, the *venire* was returnable 23 *October*, and the *diſtringas* teſted the 24 *October*; that was a diſcontinuance, becauſe not returned in the preſence of the party; and though the queen had a verdict, the court would not amend it; though ſuch amendment would have been warranted by the roll, where the *diſtringas* was well awarded; but three of the judges declared, that the ſtatute of jeofails did not extend to the king.

Cro. Car. 115. cont 311.

1 Jon. 310. 1 Page 117.

Mod. Cases 273. 2 Lev. 139. Hale cont.

Firſt, we are now to conſider the ſeveral parts of judicial proceedings, how and where they are amendable, and what is matter of form and what of ſubſtance; by theſe ſtatutes the general rule is, that the miſpriſions of the clerks and officers of the courts are amendable in all caſes; and that the miſtakes and omiſſions of the party, their counſellors, and attornies, are amendable, according as the ſtatutes make them matter of form or ſubſtance; and this will appear through the whole thread

Blackmore's caſe. 8 Co. 150.

thread of proceedings. And firſt, of this writ, which is amendable; by 8 *H.* 6. where the writ does not purſue the directions given to the *curſitor*, it may be amended by the inſtructions; as if the inſtructions were for a *præcipe, leven, thorpe-frank, generoſo*, the writ ſhall be amended according to the inſtructions * given to the curſitor; ſo *deviſit* for *demiſit*, *vacariam* for *vicariam*, becauſe the inſtructions to the *curſitor* in both caſes were right.

Hob. 213. Ibid. 118.

* Page 118.

So where there are two defendants, and this writ is *præcipe* to them both, *quod teneat conventionem*; this ſhall be amended, becauſe the inſtructions being againſt ſeveral, the *curſitor* had not purſued them.

A *Quare impedit* was brought, *ad præſentend' ad eccleſiam de Wotton*; this is an error in the ſubſtance, the vicarage being diſtinct from the parſonage; and though it is a miſtake in the ſubſtantial part of the writ, yet becauſe the inſtructions of the curſitor was *ad vicariam*, and that it was a peremptory writ, they allowed it to be amended.

Cro. Car. 74. Turner v. Palmer.

Secondly, the writ is amendable, if there be falſe *latin*, or a word that is no *latin*, if it be only in the form of the writ; but if it be in the ſubſtance it ſhall not be amendable: the ſtatute (for the expedition of the ſuitor) gives the court leave (where they have ſufficient authority to proceed) to amend the form, but not to make an authority for themſelves, by allowing the ſubſtance of the writ; ſo if the writ ſays, *imaginavit pro imaginatus*, *ave* for *avia*, this ſhall be amendable; and though in *Blackmore's* caſe *hos breve* for *hoc breve* is * denied to be amended; yet later reſolutions hold the contrary; but the eſſential part of a writ ſhall not be amendable; as in aſſize, where the *teſte* was *duodemo die* inſtead of *duodecimo die*, the writ was abated, becauſe it would have been proceeding on a wrong writ; for this could not have been

* Page 119.

been pleaded in bar to a new aſſize, and the court would not amend it, becauſe the *curſitor* was judge of the day, when the writ iſſued, and there were no inſtructions to amend the writ by *ſci. fa.* If writ be brought againſt executors in the *debet* and *detinet*, that ſhall not be amendable; becauſe the action is miſconceived, giving the court authority to proceed againſt executors *jure proprio*, when they are not ſo chargeable by the law; the want of an original is helped after verdict, by 18 *Eliz. c.* 14. So is the want of a bill upon the file, *Hob.* 130, 134, 264, 282. *Danvers's Abr.* 357. but that ſtatute does not help a vitious writ. *Cro. El.* 722. *Yelv.* 108. 1 *Sid.* 84. 8 Co. 159.

But if the original be miſrecited on the roll, as in ejectment, if it be *ſummonitus* inſtead of *attachiatus*, after verdict, if on ſearch no original is found, ſuch miſrecital ſhall not be erroneous; for the ſtatute helps the want of an original to all intents, as if there had been a good one on the file; and if there had been a good one, ſuch miſrecital * would not have been erroneous; and if the recital of the original being but form, it was neceſſary after verdict to amend the bill. 1 Saund. 317. 5 Co. 37. 1 Mod. 3. 1 Sid. 433. * Page 120.

As to the meſne proceſs, we muſt conſider the ancient practice ſoon vaniſhed, which was to ſummon the defendant on the original in debt; and on the *non eſt inventus* returned, there was an entry of the pleadings *obtulit ſe*, and had a new writ *toties quoties*; but the ſummons giving notice to the defendants, and cauſing perplexity in the proceſs, they took a *capias* in the firſt inſtance, and made their original returnable the ſame term the defendants appeared; or if they took out a ſpecial original, they made the defendant file his warrant of attorney of the ſame term, in which he really appeared: hence they took no notice of the meſne proceſs on the roll, but began with the account, that the defendant was ſummoned;

for

for though it appeared, that the ſheriff has returned *non eſt inventus* on the original, which was neceſſary in order to intitle the plaintiff to a *capias*; yet the defendant having filed his appearance, as of the term in which the original was returnable, this warrants the recital that he was ſummoned; nor is this return of *non eſt inventus* to the writ contrary to the declaration; for
* Page 121. the defendant might not be * found in the county to which the writ was directed, yet he might have had notice, and appeared according to the ſummons.

Second. We come now to the ſecond head, (*viz.*) the parol, which includes the whole pleadings till the jury proceſs iſſues; and here the miſpriſions of the clerks are amendable by 8 *H.* 6. *c.* 12. and likewiſe matters of form, though not ſubſtance, by 18 *El. c.* 14. and the ſubſequent ſtatute; the meaning of this is, that the gift or the action muſt be ſubſtantially alledged; but any other circumſtances relative to that action, ſhall be ſuppoſed by the verdict; for it was not the intention of the ſtatutes perfectly to deſtroy the *allegata*; for this would have ruined all proceedings in the courts of juſtice; but the deſign was to cure any inſufficiency, that was not of the eſſence of the plaintiff's action by the verdict.

What is ſubſtance and what not, muſt be determined in every action according to its nature: that ſeems properly to be the eſſence of the action, without which the court would have no ſufficient grounds to give judgment. In the ſame manner, that is of the eſſence of a plea, where the court has ſufficient ground to diſmiſs the defendant on ſuch plea found for him; and here it is to
* Page 122. be noted, that by 2 *H.* 6. *c.* 7. * after a verdict the plaintiff ſhall not diſcontinue.

2 Saund. 319. If there be no ſufficient certainty in that which is the gift of the action, there is no foundation for a verdict; for it cannot appear whether the damages

damages given by the jury be proportionable to the demand; or whether it be extravagant and exceſſive; and ſo there would be no power to attaint the jury if they gave an ill verdict; and if no verdict can be given on ſuch improper allegation, there can be no judgment; ſo if any part of the demand be uncertain, and intire damages given, it is the ſame, becauſe that part of the *allegata* being uncertain, there cannot (by the former reaſon) be any damages given; but in the certainty of the allegation, the court requires no more than the nature of the thing required; and therefore if a contract be made in general terms, you ſhall declare upon the contract in the ſame terms it was made; and therefore, a *quantum meruit* for *diverſa veſtimenta & omnia alia materialia ad inde ſpectantia* is good; ſo where an action is brought for things not ſubject to diſtinction by number, weight, or meaſure, it has been adjudged as *cumulum fieri ſpinas ſuas capit*; ſo in treſpaſs for breaking his cloſe with beaſts, and eating his peaſe without ſaying how much, this is good, becauſe no body * can number or meaſure the peaſe the beaſts have eat. * Page 123.

So when there are ſeveral parts which compoſe an aggregate body, there it is ſufficient to mention the body, and it is not neceſſary to mention the ſeveral parts: Trover for a ſhip and ſails is good, becauſe the ſails go to make up the aggregate; but if it had been for ſails only it would not have been good without ſpecifying the number and quality.

But trover for a beam with ſcales and weights is not good for the weights, becauſe there may be more or leſs of the weights uſed with the ſcales; and therefore all together are uncertain as to the quantities or weight of them.

Where it is only by way of aggravation, and the allegation is uncertain, or that circumſtance not proved to the jury, yet this ſhall not arreſt the

the judgment; becauſe the gift of the action is the thing itſelf in demand, and the aggravation is only the manner of doing it; and though this may increaſe the damage ſomething, yet it is not to be out of proportion of the thing in demand; as if trover be brought for a box with writings and charters, or veſtments, this is good. becauſe the trover is for the trunk, and for the detention of the goods therein, which are with-held by the detention of the * trunk, but not for the value of the goods; and therefore anciently they allowed it only for a trunk locked, but now they admit it though the trunk be not locked, becauſe the detaining is ſtill the ſame.

* Page 124.

So in action upon the caſe againſt three, for arreſting and impriſoning the plaintiff without juſt cauſe, it was alledged to be *per conſpirationem inter eos habitam*, and upon trial two of the defendants were found not guilty; ſo that the conſpiracy by the verdict was found againſt the plaintiff; yet he had judgment againſt the third defendant, becauſe the gift of the action was the falſe impriſonment, and the conſpiracy was only matter of aggravation.

The declaration muſt likewiſe contain ſuch certain affirmation, as that it may be traverſed; for if there be no certain affirmation to make the declaration itſelf traverſable, it will not be cured after a verdict, becauſe it is a defect in the ſubſtance, if nothing be poſitively affirmed to be put in iſſue; and therefore if a declaration be *quod cum* the defendant aſſaulted him, and the defendant pleads not guilty, there is nothing put in iſſue, for the pleadings have affirmed nothing; for though the defendant be found guilty on that iſſue, yet the plaintiff cannot have judgment, becauſe nothing is poſitively affirmed in the defendant by the * *Allegata*; but if the plaintiff declares *quod cum* the defendant *conceſſit ſe teneri*, or *quod cum mutuatus fuiſſet & non ſolvit*, or *cum dimiſiſſet*, and the defendant *ejecit*, in theſe caſes there

* Page 125

there is a positive charge upon the defendant, and the *quod cum* being a branch of the whole period, and making one sentence with the latter part of it, it is a positive affirmation; therefore being positive, it is equally traversable with the latter part; and therefore a man may plead *non est factum*, *non mutuatus*, *non dimisit*; because though these came under the *quod cum* taken together with the rest of the sentence, being positive they make substantive issues of themselves.

If on a demise the plaintiff declares *quod cum per quandam indenturam testat' existit quod demisit*, this is ill, as it seems by *Lutwich*, after the verdict, because there is no positive affirmation that there was a demise; and so he has not set forth a demise in a manner that it may be traversed, for the traverse must be of the demise, and not of the indenture; but if in covenant he declares *quod per quandam indenturam testat' existit*, that the defendant did covenant, this with a *profert* is good, because when he says the indenture attests that he did covenant, this is a certain allegation there was such an indenture; and the indenture is * only traversable on the issue *non est factum*. *Licet* is an affirmation for what is contained under it, as *licet ad hoc faciend' sæpius requisit'* is a posive affirmation that there was a request.

* Page 126.

The pleadings are in the *Latin* tongue, that the records may be kept for ever without changing; and therefore there must be proper *Latin* words to express the cause of action, or a proper *periphrasis*, or a proper *Latin* description concerning sufficient certainties; but if there be no proper *Latin* words to express the thing, and the *Latin* being a dead language, there can be no words for new invented things, there it is sufficient to form the word under a *Latin* termination, and explain it by an *Anglice*; so when the *Latin* word is *equivocal*, and signifies more things than one, it may be fixed down by an *Anglice*, because the

This is altered by stat. 5 Geo. 2. all proceedings being to be Englifh.

the two languages being of a different genus, there may not be words in both that exactly anſwer each other; and therefore it may be often neceſſary to uſe ſuch words as are *equivocal*.

But it is not ſufficient to uſe a general word with an *Anglice*, where there are proper *Latin* ſubſtantives and adjectives to expreſs the ſpecies; and the reaſon is, becauſe the policy of the law, and the *ſtatute* of 37 *Ed.* 3. *c.* 15. required the
* Page 127. memorials of * the court, which are always to be preſerved, ſhould be in *Latin*; and ſuch a conceſſion as this would bring all into *Engliſh*.

But if there be a proper *Latin* word in the declaration, and it be wrong Engliſhed, and the jury find verdict generally for the plaintiff, this ſhall be good, becauſe the court will intend that they give damages, for the *Latin* declaration, without having regard to the *Engliſh*.

If the word be utterly inſenſible, and intire damages given, the court will intend after verdict, that the jury gave no damages for it, an inſenſible part of the declaration being as none.

As in caſe of technical words, theſe are known to the law, and therefore they are not true *Latin*, but they are allowed in all pleadings; ſo if there be a *Latin* word ſyllabically miſtaken, yet if it has ſo far the countenance of a *Latin* word that it may be known, it ſhall after verdict be good; for ſuch ſyllabical miſtakes would not tend ſo to the general corruption of the records, as it would to coin new *Latin* words where there were already good ones in that tongue, or uſing generally words with *Anglices*.

As to certainty, there muſt be in all declarations convenient certainty, that the matter may
* Page 128. be ſo brought before the jury, that * their verdict may be given under the peril of an attaint.

Now the jury may be attainted two ways; *firſt*, where they find contrary to evidence, 2*dly*, where they find out of the compaſs of the *allegata*; but

to

to attaint them for finding contrary to evidence is not eaſy, becauſe they may have evidence of their own conuzance of the matter by them, or they may find upon diſtruſt of the witneſſes on their own proper knowledge; but if they find upon evidence that which the *allegata* does not warrant as damages greater than alledged, there it is eaſy to ſubject them to an attaint, becauſe it is manifeſt, that what is ſo found is on evidence not correſponding to their iſſue; and this was the only curb they had over the juries; for the judge being maſter of the *allegata*, and beſt knowing what proved the *allegata*, if they did not follow his direction touching the proof, they were then liable to an attaint; and therefore ſince the judges, from the difficulty of attainting the jury, have granted new trials, whereby jurors have been freed from the fear of attaint, they have taken greater liberty in giving verdicts; but ſince the attaint is only diſuſed, and not taken away, it is neceſſary that a certain matter ſhould be brought before them; and therefore in treſpaſs, the quantity and value of * the thing demanded muſt be ſo conveniently deſcribed, that if the jury find damages beyond ſuch quantities and value, it may be apparently exceſſive, and they ſubject to the attaint: and ſo on ſpecial contracts, they muſt be ſet forth ſo preciſely, that if evidence be given of another contract, not in the allegations, and yet the jury find for the plaintiff, they may be ſubject to an attaint; and were it otherwiſe, if the plaintiff had a jury to his turn, and the judge ſhould direct that the plaintiff be *nonſuit*, yet if the plaintiff would ſtand the trial, the judge muſt give poſitive directions to find for the defendant; and there would be no means of compelling the jury to find according to the directions of the judge, if they were not under the terror of an attaint if they did otherwiſe; ſo this is the only curb that the law has

* Page 129.

put in the hands of the judges to reſtrain jurors from giving corrupt verdicts.

Hence therefore it was a neceſſary concluſion, that if part of the thing in demand was uncertainly ſet out, that the jury gave intire damages, it would deſtroy the verdict, and arreſt the judgment; becauſe that part of the declaration was ſo uncertainly ſet out, that the jury could not find under the peril of that attaint: as to that it could not be a good verdict, and it cannot be ſaid * that the damages are to be applied to what is certainly demanded in the declaration, becauſe the judge of the *niſi prius* is to receive evidence of every thing in iſſue, and to ſettle the allegations; it is not his duty to diſtinguiſh the uncertain part of the declaration from what is certain, and to proportion the damages as to what is alledged with good and proper certainty, for that were to take upon him the buſineſs of the court above from whence the iſſue was directed: but if there be words made uſe of that are uncertain, where there are proper *latin* expreſſions to ſignify it, they were to be taken as perfect nullities; and therefore no damages are ſuppoſed to be given for them; for when nothing is ſet forth, no damages are preſumed to be given; and therefore this is different from an uncertain allegation in a declaration which the judge is not preſumed to ſift or diſtinguiſh.

* Page 130.

If there be any thing uncertainly alledged, and there be a judgment by *nihil dicit*, and intire damages given, this is alſo bad, though the jury do not find under the penalty of an attaint; becauſe the allegation cannot be bad, in caſe they had gone to iſſue, and good, if they had not; nor is it proper to truſt a jury further on an inqueſt, than they would truſt them on an iſſue; nor would it be eaſy to ſettle how far, * and when they are miſtaken, where there was ſuch uncertainty in the allegations; and therefore they have ſettled

* Page 131.

ſettled one uniform rule, that the judgment ſhall be arreſted, where intire damages are found on ſuch incertain allegations by an inquiry of damages as well as an iſſue.

---

* CHAP. XI.

Of Repugnancy.

WE are now come to repugnancy, and how far it is cured by verdict; ſurpluſage does not vitiate according to the maxim, *utile per inutile non vitiatur*; therefore, if ſuch ſurpluſage be repugnant to what was before alledged, it is void, for contradictions cannot ſtand; and therefore what was redundant, and need not be put into the ſentence, and contradicting what was before, is as if it had not been put there; and if it had not been inſerted, the count would have been good; for *ex hypotheſi* is a ſurpluſage and the count is good without it; as if in trover the plaintiff declares, that he was on *March* 4, poſſeſſed of goods, &c. and that afterwards, *ſcilicet* 1 *March*, they came to the defendant, who converted * them: ſo in ejectment the plaintiff declares on a leaſe made to him 3 *May*, and the defendant *poſtea*, *ſcilicet* 1 *May*, ejected; this was held good after verdict; for by the *poſtea* it appears, the defendant committed a *tort* on the plaintiff's title; and when he ſays a repugnant day, it is as if he had laid none; and if no day be laid, it ſhall be intended after verdict, that the *tort* was committed before the action brought; for it would be very foreign, after verdict, to intend that the action was brought by the ſpirit of prophecy for a wrong to be committed afterwards; and beſides the jury could not take conuzance of any fact

2 Cro. 148. Yelv. 94.

* Page 132.

done ſince the action brought, for that was not in iſſue.

Quære, whether this declaration be not right on a general demurrer; for it would in that caſe be foreign, to ſuppoſe the *tort* to be done after the action brought: but the defendant may take advantage of it, on a ſpecial demurrer, becauſe the plaintiff has not formally laid the injury before the action brought.

1 Saund. 169. *Note*; the *ſcilicet* is not always explanatory, or mere ſurpluſage, but often contains what is neceſſary to be alledged; as if the condition of a bond be to ſtand to the award of *J. S.* ſo that the award be made on or before the 16 *March*, and * Page 133. no award * be pleaded; and the plaintiff replies, that after the making the bond, and before the action brought, *ſcilicet* 16 *die Martii*, they made an award, here the *ſcilicet* is a direct affirmation, that the award was made within the time limited by the condition, and may therefore be traverſed.

2 Cro. 549. In debt on obligation the defendant pleads payment of 50*l.* 14 *Junii* 11 *Jac.* according to the condition; the plaintiff replies, *quod non ſolvit* 50*l. præd'* 14 *Auguſti anno* 11 *ſupradict' & eundem diem ſolviſſe debuiſſet, & hoc, &c.* the verdict found, *quod non ſolvit præd'* 14 *Junii*, *prout* the defendant had alledged; the objection here was, that no iſſue was joined, becauſe they do not meet in the time the money was paid; but the word *Auguſt* being plainly ſurpluſage; for when he ſaid *quod non ſolvit præd'* 14 *die*, it is a ſufficient traverſe without the word *Auguſt*, and *Auguſt* is plainly repugnant to the word *præd'*, for *præd'* refers it to *June*, and ſuch ſurpluſage being a repugnancy to what was before material, was idle and void.

Honbury v. *Ireland.* 2 Cro. 618. The bill was found 18 *Jac.* ſetting forth, that the defendant 20 *Januarii*, 17 *Jac.* beat the plaintiff's ſervant, *per quod* the plaintiff *ſervitium magnum tempus, ſcilicet prædict'* 20 *Martii* 17 *ſupradict' uſque*

uſque idem Martii extunc prox' ſequen' perdidit; on a * *nihil dicit* a writ of inquiry was awarded; and 10*l.* damages; the defendant has judgment, becauſe the giſt of the action being for the loſs of the ſervice, is not *ex neceſſitate rei* relative to the battery; and the plaintiff having laid a different month from the battery, there is nothing in the record to determine the court to the 20th of *January*, and to reject the word *March* as repugnant; and if the loſs of the ſervice ſtands on the month of *March*, 17 *March* following, it takes three months of the time of the action brought, for which the jury was not authorized to give damages. * Page 134.

If there be a repugnancy in any point material there it is not helped by verdict, unleſs the verdict appears to have been given on a different part of the declaration; as if the plaintiff on his own ſhewing had not ſo much rent due as he declares for; it is plain he may releaſe the repugnant part of his demand after general demurrer; becauſe the defendant having anſwered to the whole, ſo that there is no diſcontinuance, the plaintiff may diſcharge any part of it, and the jury (*ut videtur*) may find the part that is right, as the plaintiff diſcharges what is wrong: but if a man makes ſeveral demands in one declaration, and in the *toto ſe attingunt* miſcalls the whole ſum, and makes * it more than what is contained in the ſeveral articles demanded, this ſhall not vitiate, becauſe the caſting up one total is mere ſurpluſage; and that total not agreeing with the parts, ſuch diſagreeing ſurpluſage cannot hurt; for it is plainly the miſtake of the clerk in not computing the demand right, and not of the party in ſhewing any particular demand otherwiſe than he ought. * Page 135.

But if a man bring a plaint in an inferior court, and the declaration ſets forth particular demands, which over-run the ſums mentioned in ſuch plaint, though never ſo little, and the jury give a verdict according to the ſums in the declaration, this

this is erroneous; for the plaint in an inferior court is in nature of a writ, and is the original and foundation of the whole proceedings; and if the declaration, verdict, or judgment, are for more than is contained in the writ or plaint, it does not purſue that authority given the court by ſuch writ or plaint; and if it be beyond it never ſo little, by the ſame reaſon they might go to larger ſums *in infinitum*; and then the writ or plaint could be no direction for the future proceedings of the court.

But if the plaintiff remits ſuch overplus declared for, and given by the jury before judgment, it ſeems no error; becauſe judgment * would be given according to the writ or plaint.

* Page 136.

If an acceptance of rent of an aſſignee be pleaded, *quod receperunt & acceptaverunt de præd' J. V. redditum ſicut ſertur ſuperius reſervat', (viz.) ſex denarios de redditu præd'*; this is repugnant, becauſe it is in a point perfectly material, and it is repugnantly pleaded, becauſe it is ſaying he received the whole rent, and yet received but part, which is in ſubſtance a different thing, and *ſex denarios* is no ſurpluſage, becauſe it is the certain ſum that is alledged to be accepted; and therefore the repugnance is not in the form only.

5 H. 7. 27. Cro. Jac. 264. 1 Saund. 116.

But if the replication be repugnant to the declaration, it makes the declaration bad, becauſe the ſubſequent pleading falſifies the declaration; as if a man declares on a bond made 1 *Martii*, and the defendant pleads a releaſe 2 *Martii*; this falſifies the declaration, becauſe it could not be made the firſt. So if the rejoinder falſifies the bar, the bar is vitious, and a verdict doth not help what is matter of ſubſtance, but the matter of form only. Matter of ſubſtance is whatever is eſſential to the giſt of the action; for it was not the intent of the ſtatute of *jeofails* to ſupply any thing that is eſſential to the action that is not put in iſſue; becauſe if it had been put in iſſue, it might have been

been * found againſt the plaintiff, and a verdict will not help that, which was never put in iſſue; for the action may be ill founded, notwithſtanding that verdict, if ſomething eſſential to maintain the plaintiff's action was not put in iſſue; but if the verdict be upon a matter collateral to the plaintiff's action, and all the eſſentials to the action are well alledged, there no advantage can be taken, becauſe, when the cauſe is tried, the whole weight of it is put on the point in iſſue; and where the parties had been at the expence of a trial, it was the intent of the ſtatutes, that the verdict ſhould determine the cauſe, and the wrong pleading of ſuch collateral matters ſhould not turn to the diſadvantage of any of the parties; for the benefit of ſuch collateral matters is waived when they have put the ſtreſs of the controverſy on the point in iſſue; as if treſpaſs be brought for chaſing the plaintiff's beaſts, the defendant ſays the place where, *&c.* is his frank tenement; the plaintiff in his replication preſcribes for common *pro magnis averiis* in the place where, levant and couchant in *Dale*, and does not ſhew they were *magn' averia*, or that they were levant or couchant in *Dale*; yet if the preſcription be in iſſue, and that be found for the plaintiff, he ſhall have judgment and becauſe the iſſue being on the right of common, which is collateral to the injury done by the beaſts, and the right being found for the plaintiff, the defendant has waved all other benefit he might have taken of the replication by a demurrer; and therefore the ſtatutes hinder him from taking any benefit after verdict; for the defendant by his iſſue confeſſes the injury in chaſing the beaſts, if there be no right of common, and waves the advantage he might have taken on demurrer, for the plaintiff's not bringing himſelf within the preſcription of what was eſſential, to ſhew an injury in chaſing the beaſts. So in *aſſumpſit* by *John Thomas* executor of *Archibald Joyce* againſt *Willoughby*,

* Page 137.

Saund. 226.

* Page 138.

Co. El. 458. S. P.

Poſt. 141, 2.

loughby, for a promiſe to the teſtator, that in conſideration that the teſtator would deliver to him on requeſt 40*l.* to repay him at ſuch a day, and the declaration was *quod idem Archibald dicit in facto quod ipſe idem Arch'* delivered him the 40*l.* on *non aſſumpſit*, and a verdict for the plaintiff, the judgment was arreſted, becauſe there is no averment that the money was delivered, the delivery of the money being the conſideration of the promiſe, which was the gift of the action.

Cro Jac. 587.

But if any thing eſſential to the plaintiff's action be not ſet forth, there, though the verdict be found for him, he cannot have judgment; becauſe, if the eſſential part of * the declaration is not put in iſſue, the verdict can have no relation to it; and if it had been put in iſſue, it might have been found falſe; and ſuch matter, as is the foundation of the action, not being alledged, there is no ground for the judgment; as if an action of treſpaſs be brought by a maſter for the aſſaulting and beating of his ſervant, and does not ſay, *per quod ſeruitium amiſit*, this is ill after verdict.

Bulſt. 173.

* Page 139.

Whatever is eſſential to the gift of the action, and cannot be cured by a verdict, are ſuch ſubſtantial facts as muſt be laid in proper time and place, ſo that the defendant may traverſe them diſtinctly if he pleaſes; for as he may traverſe the whole, ſo he may traverſe each ſubſtantial part, in order to put the weight of the cauſe upon any thing, that will put an end to it: and this is allowed that the jury may be more eaſily attainted of falſe verdict; but ſuch parts of a declaration, as cannot make a ſubſtantive iſſue, ſhall be intended after verdict, becauſe they are matter of form only, which the ſtatute deſigned to cure; and therefore, if the plaintiff declares, that the defendant promiſed, if the plaintiff married his daughter at his requeſt, that he would give him 10*l.* and alledges in fact that he did marry her but does not alledge any requeſt, this is good after

after a verdict; * becauſe the requeſt is only a form in which the promiſe was conceived, and not an eſſential part of the promiſe to be proved to be precedent to the marriage; for the father, unleſs he had deſired the match, had never made the promiſe; and therefore *ſecundum ſubjectam materiam*, it cannot be ſuppoſed to be the intention of the parties, that a previous requeſt ſhould be neceſſary, and therefore ſhall be intended after verdict. * Page 140.

As the plaintiff's action muſt have all eſſentials neceſſary to maintain it, ſo the defendant's bar muſt be eſſentially good; and if the gift of the bar be bad, it cannot be cured by a verdict found for the defendant; but if it had been found for the plaintiff, he ſhall have judgment, either for the badneſs or falſehood of the bar; but if it be bad only in form, a verdict will cure it; and if the gift be traverſed, all collateral circumſtances will be admitted after verdict. Cro. El. 778.

Thus in action of debt on ſingle bill, and the defendant pleads payment without an acquittance, and it is found for the defendant, yet he ſhall not have judgment, becauſe the gift of the plea is bad, ſince the obligation is in force until diſſolved *eodem ligamine quo ligatur*, and the acquittance under the ſeal of the plaintiff is the gift of the bar; but if it be found for the plaintiff, * he ſhall have judgment, becauſe the bar was not only bad in ſubſtance, but found falſe, ſo that his declaration ſtands unimpeached. 2 Cro. 377. Wingfield v. Bell. Cro. El. 778. * Page 141.

But if the bar be only bad in form, a verdict will ſupply it; as if in debt on a bond conditioned for the payment of 100*l.* 25 *Junii prox'*, and the defendant pleads payment on the 20 *June*, and it is according to the condition found that he did pay 20*l.* though this bar be bad in form, becauſe it does not follow the condition, the plaintiff might have taken advantage of it on ſpecial demurrer, yet the verdict having found payment before 2 Cro. 435. Holmes & Brocket.

before the day, that in law is payment at the day, and the ſubſtance is found: but where the gift of the bar is good, though ſome of the collateral circumſtances are omitted, which the plaintiff, by demurring ſpecially might have taken advantage of, yet if they go to iſſue on the bar, and that be found for the defendant, the verdict will cure this omiſſion, becauſe the collateral matters are admitted and waved by going to iſſue on the gift of the bar.

Ante 138. As in treſpaſs *vi & armis*, the defendant juſtifies, for that he had common for all his beaſts levant and couchant in the place, *&c.* by preſcription, and put in the ſaid cattle *ut eand' commun'*, *&c.* there iſſue was on the preſcription, and found for the * defendant: exception was taken that he did not aver that the beaſts were levant and couchant; but this after verdict was intended; for the gift of the bar is the right to burthen the plaintiff's ſoil; and when the plaintiff takes iſſue on that, and controverts that right, he admits there was not any treſpaſs, in caſe that the defendant had ſuch a right; he likewiſe admits that the defendant has brought himſelf within that right, becauſe it would have been nugatory to have denied that right of preſcription, which if it had been found, the plaintiff had not brought himſelf within it; and therefore the traverſe of ſuch gift of the bar is a waiver, and admittance of ſuch collateral circumſtances.

2 Co. 44. Prame v. Pringer.

* Page 142.

CHAP.

CHAP. XII.

The Manner of Amendment.

HAVING thus conſidered what is matter of form, and what is ſubſtance in the pleadings,

We come in the next place to conſider how the amendments may be made through every part of the record; and here we may obſerve, that the court during the ſame * term may amend any part of the roll, becauſe it is yet in *fieri*, and ſuch amendments might be made at common law without the aid of any of the ſtatutes. * Page 143.

After the firſt term you may amend the imparlance roll by the office paper book, becauſe that is inſtructions to the prothonotary to enter up the imparlance roll; and therefore that is equally amendable as the original is by the inſtructions given the curſitor; but this is done on the oath of the defendant's attorney, as in *Blackmore*'s caſe to amend the writ, *Chamberlain*'s caſe; oath muſt be made that the paper book has not been altered ſince the defendant's attorney has put his hand to it, which he always does when he joins in iſſue or demurrer; and this amendment ſeems to be reaſonable, becauſe the defendant has not miſled or deceived. Rol. 198. Hob. 264. 10 H. 7. 25. Cro. El. 258. Lit. Rep. 278. Hob. 184. Latch 86.

In the *King's Bench* this will amend both the bill and the roll of the office paper book, becauſe this is inſtruction for making them both; but they cannot amend from any other paper book, becauſe ſuch book is not inſtructions left in the office to make both the roll and the bill.

But where there is no office book, as where the general iſſue is pleaded, it ſeems they ſhould amend

amend either the bill or the roll, by the declara-
* Page 144. tion of which they gave * the defendant a copy, becauſe ſuch declaration is the only inſtruction to the clerk of the office to enter.

If the bill on the file be with blanks, or the imparlance roll be with blanks for dates or quantities, yet it may be amended by the paper book, by the clerks themſelves, till a *recordatur* be entered on the verdict returned on the *niſi prius* roll;
Worthey's Caſe, Litt. Rep. Kelynge 52. Latch 164. but after ſuch *recordatur* it can be only be amended by the court, for the roll lies with the prothonotary to be made up according to the paper-book, till the *recordatur* of the verdict be allowed; but if after the *recordatur* be entered it is entered on the roll *in ſtatu quo*, then the court is ſuppoſed to take conuzance of it in what manner it then was; and if clerks might afterwards alter the roll after entry of the verdict, they might amend it in the verdict, which is in the *niſi prius* roll, and which was ſettled by the judge of *niſi prius*, and cannot be altered but by rule of court.

Roll. Ab. 198, 199. Hob. 251. The imparlance roll cannot be amended by the original writ, becauſe the original writ is the authority on which the court proceeds, which the plaintiff muſt proſecute; for otherwiſe, he does not proceed in that cauſe; if the count varies in
Jon. 304. Cro. El. 722. Cro. Jac. 654. form, † the defendant may plead it in abatement, for he has abated his own writ by proſecuting *
* Page 145 it in a different manner; but if it varies in ſubſtance, the defendant may move in arreſt of judgment, becauſe he has no authority to proceed, having proſecuted a different matter from that which the writ has given authority to the court to take cognizance of.

Cro. Jac. 92. 415. Lit. Rep. 72. Hutt. 33. 3. 1 Danv. 345. The imparlance roll cannot be amended by the plea roll, or *niſi prius* roll; for the imparlance roll is the original declaration, and the plea roll

† Compare the reaſoning here adduced with the Note in p. 89.

roll is no more than a recital of the imparlance roll; and therefore it begins with an *alias prout patet*, and it is no more than the count of the ſecond term, to which the defendant pleaded *tre tenus*; and the *niſi prius* roll is but a tranſcript of the plea roll, to carry the iſſue into the country.

But if a declaration be againſt *J. B.* and he imparls by the name of *R. B.* but pleads by the right name *J. B.* this is no material fault, becauſe it is only a continuance from one term to another; and by pleading by the right name, he acknowledged he imparled by a wrong name. Roll's Ab. 159.

The plea roll may be amended by the imparlance roll, becauſe it is but a recital of the imparlance roll, but not by the *niſi prius* roll, which is but a tranſcript from the plea roll: if the plaintiff or defendant be well named in the beginning of the record,* but afterwards be miſtaken, and the name is *idem ſonans*, this ſhall be amended, becauſe that is but a miſtake in ſyllables by the apparent *vitium ſcriptoris*, which it is the intent of the ſtatute to amend. Cro. Car. 92. Lit. Rep. 72. Hutt. 92. 1 Danv. 345. Cro. Jac. 354. Cro. El. 204. * Page 146.

If there be a miſtake in the attorney's name, it may be amended by the warrant of attorney, which being precedent will amend the roll, and the court will take notice that it is the ſame attorney that appeared; but if the name of a ſtranger be put into the plea, this will be error, for it cannot then appear to the court the ſame man that appeared did plead, and then there was no plea pleaded; and ſo if the defendant's name be miſtaken in the putting in his plea as in an *auditu querela*, the plaintiff ſurmiſes that he entered into a ſtat. 300*l.* to the defendant for the payment of 50*l. per ann.* for ſix years, to *John Buſh* a ſtranger; if the defendant comes and *prdteſtand'*, &c. *pro pli'to id. Johan. Buſh* inſtead of the defendant, this is erroneous, becauſe it does not appear to the court but that the plea was put in by the ſtranger to Moor 711. Heley v. Rigs. Yelv. 38. Hughes v. Philips. Cro. Jac. 13. Cro. El. 94.

to whom the payment was to be made, and not the defendant; but if the plea had been that the *præd'* plaintiff *ven' & dicit*, inſtead of the defendant, this will be conſtrued to be but the miſpriſion of the clerks; for it is apparent that the plaintiff could not be the * defendant, but it ſhall be ſuppoſed to be put in by him that appeared, ſince there is no other perſon.

Ruſſel and Grange.

* Page 147.

Poſt. 161.

CHAP. XIII.

Of Iſſues.

WE come now to the joining of iſſues; and here we muſt obſerve that where the iſſue is immaterial, the verdict will not aid it, but where it is informal it is helped.

An informal iſſue is where it is not traverſed in a right manner.

A verdict cannot help an immaterial iſſue, becauſe what is alledged in the pleadings is not put in the iſſue, or, if it be, is not decilive between the parties, and ſo the verdict is no good foundation for the judgment.

If what is material in the pleadings be not put in the iſſue, it is not made neceſſary to be proved on that trial, and will not in all caſes be a foundation for the judgment; for the courts in theſe caſes are judges on what point they ought to go to iſſue, ſo that it be a legal charge by the plaintiff, or diſcharge * by the defendant, ſince it is the province of the judges to ſettle the matters of law, and the jury the matters of fact.

* Page 148.

3 Leon. 66.

If the plaintiff declares on a promiſe to find the plaintiff, his wife, and two ſervants, with meat and drink for three years, on requeſt; the defendant pleads that he promiſed to find the plaintiff and

and his wife, with meat and drink, *&c. abſque*, that he did promiſe to find, *&c.* the plaintiff replies, the defendant did promiſe to find for three years next following, *& hoc petit, &c.* and verdict for the plaintiff, yet he ſhall not have judgment, becauſe the promiſe is traverſed in the ſame manner; the plaintiff in his replication alledges to promiſe next after he was married, which is not the ſame the defendant traverſed, ſo that they are not at iſſue on a point traverſed in bar.

So in treſpaſs, the defendant pleads an award between the plaintiff and *J. S.* of the one part, and the defendant on the other part, and plaintiff replies *quod non habetur talis concordia* between plaintiff and defendant as alledged, and on iſſue joined, verdict for the plaintiff; yet he ſhall not have judgment, becauſe the plaintiff does not traverſe the ſame concord that is ſet out in the defendant's bar, but puts another * concord in iſſue not alledged in the defendant's bar, between the plaintiff and defendant only, and the court cannot be certain which is proved on the trial; and tho' it may be ſaid in this caſe that either may bar the action, yet only one thing is to be put in iſſue; and if it ſhould be otherwiſe, there would be no correſpondence between the *probata* and the *allegata*. So in debt on bond, conditioned for the payment of 105*l.* the defendant pleads payment of 100*l. ſecundum formam & effectum conditionis*, the plaintiff replies *non ſolvit præd'* 105*l.* and verdict *quod non ſolvit* the ſaid 105*l.* this is an immaterial iſſue not aided, for the plaintiff has not traverſed the ſame payment that is in the defendant's plea.

1 Rol. Rep. 96.

* Page 149.

Cro. Jac. 585.

So in debt on bond, conditioned for the payment of 60*l* on the 25th of *June*, the defendant pleads payment on the 20th of *June, ſecundum formam & effectum conditionis*, and iſſue is joined, and the verdict finds *quod non ſolvit* 60*l.* at the 20th; the plaintiff ſhall not have judgment; for the

the iſſue is *dehors* the matter of the condition, and ſo void, it might have been paid the 25th, and though it was not paid the 20th, ſo it does not appear that the condition was broke; but where the iſſue is deciſive between the parties, though it be not ſo apt, yet this ſhall be cured after a verdict; as in replevin, the * defendant avows that *Ellen Enderby* was ſeized in fee, and took *Pigot* to huſband, and had by him *Thomas*; that *Ellen* and that *Thomas* granted a rent-charge, for which he diſtrains; the plaintiff replies, that one *Fiſher* being ſeized in fee, gave the land to *J. Enderby* in tail, who had iſſue *Ellen*; that *J. Enderby* died, and *Ellen* entered being ſeized in tail, took *Pigot* to huſband and had iſſue *Thomas* who is dead, who granted, *&c. abſque hoc, quod Ellen* was ſeized in fee, though this was an informal iſſue; for the plaintiff ought to have traverſed that *Thomas* the grantor was ſeized in fee; yet it is a deciſive iſſue; for it is allowed on both ſides, that *Thomas* was in by deſcent from *Ellen*, and if *Ellen* was ſeized in fee, *Thomas* was too, and conſequently had good right to make the grant.

Yelv. 54. Cro. Jac. 44.

* Page 150.

If an iſſue be on a point that is impoſſible in the ſubſtance and nature of the thing, it is not cured by the verdict; but if it be only impoſſible in the manner and form of it, a verdict will cure; for where the ſubſtance is impoſſible no verdict can cure it, becauſe it cannot make that true which cannot poſſibly be; but where it is only impoſſible in the manner of it, the thing which is poſſible may be found to be or not, and the manner which is impoſſible totally rejected: thus if an action of aſſault and * battery be brought, and the defendant juſtifies by conveying to himſelf an eſtate by copy of parcel of the manor of *C.* whereof *D.* is ſeized, and that the plaintiff came upon it, and that he laid his hands *mollitur*; the plaintiff replies and conveys to himſelf an eſtate by copy of another parcel of the manor, and that *D.* lord

* Page 151.

lord of the manor had for himſelf and tenants a way over defendant's piece of land; iſſue is joined, and verdict for the plaintiff.

This is a void preſcription; a copyholder being originally but a tenant at will, could not preſcribe at will, but in the name of the lord; for an eaſement in the manor he could not preſcribe in the lord's name, but muſt lay it by cuſtom, as the *lex loci* being laid here by way of preſcription, is in its own nature void, and the verdict could not make that, which was repugnant in the nature of the thing, to be true or falſe, and by conſequence could not help it. 4 Co. 31. b. Hob. 112. Moor 869.

But in debt on a bond conditioned for the payment of 100*l.* on 31ſt of *September*, and defendant pleads payment at the day, and it is found againſt him, the plaintiff ſhall not have judgment, becauſe the payment is what is material, and the day is impoſſible, and altogether idle and void, for not being paid before the end of that month the obligation is abſolute. Cro. Car. 25. 78.

* But where the ſubſtance of the bar, and the replication be put in iſſue, though it be informally, yet it is cured by a verdict; as if an *aſſumpſit* be for wares ſold, and the defendant pleads *nonage*, and the plaintiff replies they were for neceſſaries, *& hoc petit quod inquiratur per patriam*, *& prad'* defendant ſays the like, this iſſue is informal, becauſe the plaintiff ought not to have cloſed the iſſue, but averred his aſſertion that they were for neceſſaries which the defendant might have denied; yet ſince the matter of his replication be put in iſſue, *viz.* whether they were neceſſaries or not, the defendant has waived all objections to the form, and by ſuch a waiver it appears, that he is not any wife injured by not rejoining, and it being found that they were neceſſaries, the plaintiff ought to prevail. * Page 152. 1 Sid. 341. 42. Burton and Chapman. Hob. 113.

So in debt on a bond conditioned for the payment of 8*l.* on a certain day, and defendant pleads payment on the day in the condition, *&* Cro. Car. 316, 317. Parker and Taylor.

de hoc ponit ſe ſuper patriam, & prad' the plaintiff; and found for the plaintiff; here the defendant has cloſed the iſſue on the plaintiff by the *hoc ponit ſe ſuper patriam*, yet the defendant cannot take advantage of the informality of his own plea, and it is waived on both ſides, when they go to iſſue on the ſubſtance of it.

* Page 153. 1 Sid. 345. Cro. Car. 599. 8 Co. 66.

* But if in treſpaſs the defendant pleads a ſpecial juſtification, and the plaintiff replies, *de injuria ſua propria*, there though the iſſue is found for the plaintiff, yet it is wrong after verdict, becauſe the *injuria ſua propria* does no more than affirm the declaration, and does not confeſs or deny the bar; and therefore the gift of the bar is not put in iſſue at all, but rather ſtands confeſſed by the replication, ſince the cauſe is not traverſed; for ſaying it was *de injuria ſua propria*, is not more than ſaying, that notwithſtanding the cauſe mentioned in the bar, the defendant committed the injury, which the bar being a ſufficient excuſe to, cannot be; but it does not in the leaſt put the bar in iſſue.

If the iſſue be joined on a negative pregnant, that is an iſſue *that rather ſuppoſes an affirmative, than the contrary*, though it is bad on the demurrer (becauſe the plea, *&c.* is not a certain affirmation or negative of any ſingle point in queſtion) yet after verdict, this being only an error in phraſe ſhall be good; as if an action of treſpaſs be brought for entering into his houſe, the defendant pleads the daughter licenſed him to enter, by which he entered; the plaintiff replies, *quod non intravit per licentiam ſuam*, though this replication be a negative pregnant, yet it will be good after verdict.

* Page 154. 2 Cro. 312. Gill and Glaſs.

* So if it be an affirmative pregnant of a negative; as if in debt for rent on a leaſe, the defendant pleads, *quod querens nihil habuit in tenemento tempore dimiſſionis*; and the plaintiff replies, *quod habuit in tenemento*, without ſaying what eſtate, though this had been bad on a demurrer; becauſe

becauſe by not ſhewing what eſtate he had, it is pregnant of this negative, that he had not ſuch an eſtate by which he had power to demiſe, nor that he had not ſuch an eſtate as he could demiſe. 1 Sid. 444. 1 Vent. 70. 2 Keb. 628. S. C.

So in an action of aſſault and battery, the defendant pleads, that the plaintiff neglected his ſervice, *per quod moderate caſtigavit:* the plaintiff replies, *quod non moderate caſtigavit*; and the iſſue was found for the plaintiff; for though this be an informal traverſe and bad on demurrer, being rather a traverſe of the chaſtiſement than of the moderate manner of doing it; and the right traverſe ſhould have been *de injuria ſua propria abſque tali cauſa*; yet after verdict it is good, becauſe the jury have aſcertained that he did beat him immoderately.

In an action of debt, if not guilty be pleaded, and there be a verdict for the plaintiff, it ſhall be aided by the ſtatute, becauſe, being an ill plea and a falſe one the plaintiff ought to have his judgment, both for the badneſs and for the falſehood; but if the * verdict was for the defendant, yet the plaintiff ſhould have judgment, becauſe the deed is not anſwered by the bar. Noy. 56. Cro. El. 778. *cont.* * Page 155.

So in an action of covenant, that *C.* was ſeized in fee, and aſſigns for breach, that *C.* was not ſeized in fee, and *ſic infregit conventionem*, the defendant pleads *non infregit conventionem*, though in covenant the defendant ought to traverſe either the deed or the breach, and both cannot be involved in *non infregit conventionem*, becauſe the giſt of the action lies on the deed, which muſt be traverſed by itſelf: yet when the defendant pleads a bad plea, which is found againſt him, the plaintiff may have judgment either for the inſufficiency or falſity of the plea. 1 Sid. 289.

If a defendant pleads to part, and ſays nothing to the other part, and the plaintiff replies to ſuch plea, without taking judgment for part of the plea not anſwered to; this is a diſcontinuance, *Ante.* *Poſt* 158.

becauſe he does not follow his entire demand in the court; but ſuch diſcontinuance is cured by the verdict, becauſe it was the intent of the ſtatute, that when they deſcended to iſſue they ſhould waive all objections of this nature; for both parties by deſcending to iſſue ſuppoſed a cauſe in court; and therefore they ſhould not afterwards make any objections, that the cauſe was out of court before trial.

* Page 156. 3 Lev. 55. Craver v. Morely.

* But if the verdict itſelf made a diſcontinuance, and found part of the declaration, and nothing to the other part, this is a diſcontinuance not cured by the ſtatute: becauſe the intent of the iſſue is that the whole event of the matter in iſſue ſhall be determined; and the anſwering to part doth not anſwer to the precept of the court, nor to the deſign of the iſſue, which is to determine the whole cauſe, that ſo it may be a bar to any other action. So that ſuch imperfect verdict ought not to be received by the judge of *niſi prius*, it not anſwering to the iſſue; and if it be received, it ought not to be entered of record; and if it be, it is erroneous, becauſe the whole matter in iſſue is not anſwered, and a *ven' fac' de novo* ought to be awarded, ſo that the whole matter in iſſue may be determined in that action, and this is not aided by the ſtatute, which did not intend to help imperfections of the verdict, which is ſtill deſigned to make an intire end of the iſſue; but it helps the diſcontinuance before the verdict, becauſe the verdict is by the ſtatute a foundation for the judgment, which the parties cannot by miſtake change or alter.

3 Lev. 39. Randall v. Brees. Carter 51. Ayre v. Bloſſom *al' cent.*

Thus in debt for rent reſerved out of the copyhold and freehold lands, the defendant pleads the eviction of the whole by the deviſe of the leſſor (the plaintiff's father:) * the plaintiff by proteſtation, that he was not evicted of the copyhold, replies that the freehold was entailed; and therefore the deviſe was void; the defendant traverſeth

* Page 157.

verſeth the entail, and verdict found for the plaintiff for the whole rent; in this caſe the plea as to the copyhold was diſcontinued, and that the verdict was for the rent iſſuing out of the copyhold, as well as the freehold; yet the court held, that the verdict aided the diſcontiuuance. So in action of aſſault and battery againſt two, and there is a diſcontinuance as to one of the defendants, it is cured by a verdict. Co. 11. Hidgen's caſe.

In treſpaſs for entering his houſe and cloſe, *Grenden* the defendant juſtifies by virtue of a *capias utlagatum* againſt *Shelling*, and that he went in the foot-path through the ſaid cloſe to the ſaid plaintiff's houſe, who licenſed him to enter; the plaintiff traverſeth the licence, and found for him, though here was a diſcontinuance as to the cloſe, yet the iſſue being on the licence, and that being found for the plaintiff, the verdict cured the diſcontinuance as to the cloſe. Cro. Jac. 304. 350. Watton v. King. 1 Sid. 96.

If a man juſtifies to the whole, and his plea goes but to part, the plea is bad, becauſe being pleaded as to the whole, and going but to part, and being an inſufficient anſwer to the whole, conſequently the * plaintiff muſt have judgment; and if the plaintiff on ſuch plea does not demur, but takes iſſue, ſince he takes iſſue on a bad bar, whether the iſſue be found for the plaintiff or defendant, the judgment ſhall be for the plaintiff, becauſe the bar is inſufficient; for though the iſſue ſhould be found for the defendant, yet that will not amend the bar, and make that go to the whole, which goes to part only, and therefore here the iſſue is material. Salk. 179, 180. * Page 158. Then it would be better to try than demur.

But if the defendant has pleaded a bar to part, and ſays nothing to the reſidue, there the plea is good as to the part to which it is pleaded, and nothing being ſaid as to the reſidue, the plaintiff ought to have judgment for want of a plea, as to the reſidue: if he does not take judgment, it is a diſcontinuance of his action; for the defendant *Ante* 155.

ſendant having ſaid nothing to that part, if that *nihil dicit* be not entered, there being no continuance of that part of the action, by what the defendant hath ſaid to it, the plaintiff likewiſe not having ſaid any thing to it, to continue it in court, it is a diſcontinuance; and if any part of it be diſcontinued, it is a diſcontinuance in the whole; for there is not the ſame demand ſubſiſting, that the plaintiff had ſet forth in his declaration; but if the plaintiff takes iſſue, and
* Page 159. obtains a verdict, the diſcontinuance is aided * by the ſtatute of *jeofails*, which cures all diſcontinuances before verdict; for the iſſue is immaterial, becauſe the iſſue is not material to every thing to which the plea is pleaded; for being not material as to the whole, it was in that caſe an immaterial iſſue.

1 Salk. 100. Market v. Johnſton. Where the plaintiff declares in *Michaelmas* term before *cras animar'* ſo as to have a plea to enter of that term, and the defendant gives him a plea to part only, and the plaintiff enters his
6 Mod. 626. plea as of *Hilary* term, and upon demurrer in *Hilary* term the defendant objects the diſcontinuance, and deſires the plea may be entered as of the term in which it was entered, the court would not interpoſe to make them enter their plea on the rolls of *Michaelmas* term, becauſe, if the court had done this, the plaintiff's action muſt have been diſcontinued by ſuch rule, whereas the plaintiff having given the defendant an imparlance, when he needed not, it is not erroneous, or any wiſe prejudicial to the defendant, and the plaintiff has the whole *Hilary* term to take judgment for the part not pleaded to, and therefore there could be no diſcontinuance during *Hilary* term.

But if an action of debt be brought againſt an executor or adminiſtrator, and he pleads ſeveral
* Page 160. judgments to cover the * aſſets, and as to ſome of the judgments the pleas are good, and as to

ſome

ſome bad, this is a diſcontinuance of the plaintiff's action, becauſe the plaintiff's demand remains the ſame, and is ſtill purſued; and ſince the judgments of ſome are avoided by a good plea, and all the judgments amounting but to one cover of the aſſets, if one of them be voided, the plaintiff muſt have judgment for the whole, becauſe there is not a ſufficient bar to his demand, ſince the whole avoidance of the plaintiff's demand to charge the aſſets, amounts to but one bar. Vaugh. 104. Semble con.

So in an action of battery and wounding the defendant juſtifies as to the battery, but ſays nothing as to the wounding; and the iſſue was found for the defendant; though this plea is a diſcontinuance *quoad* the wounding, the plaintiff having deſcended to iſſue in the juſtification of the battery; and that being found againſt him the verdict cures it; and the judgment is not here for the diſcontinuance of the plaintiff, but on the verdict, becauſe it will then be a bar to another action. Hob. 187. Freeſtone and Boyer. *Quoad.* 12 Mod. 603.

But in treſpaſs for a coat and cloak, and not guilty pleaded, if the jury find that the defendant as a conſtable took his coat for a tax, but ſays nothing as to the cloak, this is an imperfect verdict, not determining the point in iſſue between the parties. 3 Lev. 55. 3 Cro. 134.

* If to an iſſue tendered by the plaintiff, the defendant joins the *ſimiliter* by the plaintiff's name, or the plaintiff joins the *ſimiliter* by the defendant's name to an iſſue tendered by the defendant, this ſhall be amended, there being a negative and affirmative before, between the plaintiff and defendant, which is the *pattern* from whence the joining of the iſſue is to be taken; there is a ſufficient copy from whence this may be amended, it being a plain miſtake from the nature of the thing of one man's name for another. * Page 161. *Ante.*

CHAP.

CHAP. XIV.

Further conſiderations touching amendments.

Cro. Car. 204. Week's Caſe.

IF the *niſi prius* roll varies from any material part of the plea roll, and the plaintiff becomes *nonſuit* through ſuch variance, there the *nonſuit* ſhall not be entered up, but a *venire fac' de novo* awarded; as if the *niſi prius* roll miſrecites a judgment on which the action is founded, and it be entered right on the plea roll, the reaſon of this * Page 162. is, that the *niſi prius* roll being materially * different from the plea roll, it is no tranſcript: and therefore the *nonſuit* for not proving what was not in iſſue is a perfect nullity, and it ought not to be entered on the record.

Cro. El. 340. Long v. Mitchell.

The *niſi prius* roll, on which the *poſtea* is entered, ought to be preſerved to warrant the entry of the judgment on the plea roll; for in a writ of error, if they alledge diminution of the *poſtea* and *habeas corpora*, and there is none to be found, the judgment is erroneous, becauſe there is no warrant to enter the verdict on a plea roll.

Moor 631.

If the *niſi prius* roll differs from the plea roll in any matter that alters the iſſue, it cannot be amended by the plea roll; becauſe it does not give the judge of *niſi prius* authority to try the matter which is in iſſue between the parties on the plea roll; but if the *niſi prius* roll differs in any other matter which does not alter the iſſue between the parties, there it may be amended, becauſe the judge of *niſi prius* has authority to try the matter in iſſue between them; as if iſſue be on the addition of defendant's name, whether *J. S.* was huſbandman *die impetrationis br'is*, and the *niſi prius* roll be, whether he was huſbandman generally,

8 Co. 166. Blackmore's Caſe.

rally, omitting the words *die impetrationis br'is*, this is not in the plea roll. So in a bond conditioned for the payment of a certain ~~ſum~~ * at the firſt feaſt next enſuing the date, and on the *niſi prius* roll the day be omitted, this is not the ſame iſſue on the plea roll, becauſe there is nothing on the *niſi prius* roll to fix the feaſt on which the payment was to be made; and ſo the iſſue on the plea roll is not right. Brownl. 47. * Page 163.

But where the defendant's name is omitted in joining the iſſue, this ſhall be amended by the plea roll, becauſe the iſſue is not varied, and the juſtices of *niſi prius* have authority to try it by *diſtringas*. Dy. 260.

So when in action upon the caſe upon *aſſumpſit*, the defendant (upon the plea roll) pleads *non aſſumpſit*, and on the *niſi prius* roll it is *non culpabilis*, after the verdict, the *niſi prius* roll ſhall be amended by the plea roll, for both pleas traverſe the giſt of the action, and the defendant has the ſame advantage in the *non culp'* as in the *non aſſumpſit*, and the iſſue is the ſame in ſubſtance. *Ibid.*

The ſpecial verdict may be amended according to the minute or note, becauſe the minute is the inſtructions taken at the aſſizes for the entering it up; but nothing can be added to the minute, though never ſo ſtrongly proved by the evidence, becauſe that would be to ſubject the jury to an attaint for a fact that was never found by them; which is contrary to juſtice to do. Bulſ. 217. 2 Cro. 235. 20 H. 6. 12. Styles 207.

* If the jury find a certain verdict, and it is entered uncertainly on the record; if the judge, who tried the cauſe, remembers certainly how the jury found it, it ſhall be aſcertained by the memory of the judge, and the verdict be made certain as the jury found it. * Page 164. Cro. Car. 338.

Judgments.

1 Leon. 13. We come now to the amendment of judgments; and we muſt here note, that the court will make no amendment that will defeat a judgment, the ſtatute allowing amendments in affirmance of judgments only.

1 Sid. 70. Raym. 39. Cro. Car. 57. Cro. El. 656. 865. The names of the plaintiff and defendant may be amended, if the docquet be right; but if the docquet roll and judgment be both miſtaken, *quære*, whether this will be amended; for the docquet roll is the *Index* to the judgment, and made at the ſame time, in order that purchaſers may find out ſuch judgments and be ſafe; therefore, if the docquet roll be right, the judgment will without doubt be amended, becauſe there is a proper indication to purchaſers, that there is ſuch a judgment, and there is ſufficient on record, from whence to amend the judgment: but if the docquet and judgment both be wrong in the names the purchaſer may be deceived; * and *quære*, how far the court will amend the judgment, though there be ſufficient inſtructions on the record to amend it by; becauſe a purchaſer may be defeated of his title by this amendment, though he has done every thing the law requires, to make himſelf ſecure in his title.

* Page 165.

But ſince the ſtatute of 11 *W. & M.* the court will amend the judgment, but not the docquet; if the judgment be right, and the docquet wrong, before the ſtatute the judgment bound the lands, becauſe the judgment was the lien on the lands; and the docquet no more than an index to find the judgments readily; and the ſtranger aggrieved by ſuch miſdocqueting had only his remedy againſt the officer for not docquetting them truly.

But ſince the ſtatute ſuch judgment does not bind the purchaſer, for a falſe docquet is as none.

The

The judgment is amendable from any other part of the record, when there is any thing on record itſelf to ſet it right; as if the verdict be to recover *Dale* from *A.* and *Sale* from *B.* and the judgment be to recover *Sale* from *A.* and *Dale* from *B.* this might be amended; for this is only the miſpriſion of the clerk, ſince he had ſufficient inſtructions from the verdict to enter the judgment truly. 8 Co. 162. 2 Ro. Rep. 253. 254.

* So in a *quare impedit* for the preſentation of a vicarage, and the judgment is *quod recuperet eccleſiam*, this ſhall be amended. * Page 166.

So if the judgment be given on a demurrer againſt the plaintiff, and the entry of the judgment is of a *nonſuit*, inſtead of a judgment in demurrer, this ſhall be amended.

If the damages *de incremento* be miſtaken by the clerk, the court will amend it by the judgment book, becauſe that is a ſufficient inſtruction to the clerk to enter the judgment by; and therefore it was his miſpriſion not to go according to his inſtructions, which may be rectified and amended.

Thus, if judgment be againſt a man and wife, and the judgment is, *quod* the wife is *in miſericordia*, and not the huſband, this was amended by the paper-book that was right. Palm. 199. Hob. 127. Cro. Jac. 6.

But if there be a miſtake or error in the judgment in any ſuch matter in which the clerk has no inſtructions, as if a *capiatur* be entered for a *miſericordia*, or *e converſo*, this was error in the judgment; becauſe before 16 & 17 *Car.* 2. it made fine to the king, and a difference in the execution; and there was no inſtruction in the record itſelf in the judgment book, whereby to amend it; and *non conſtat*, whether it was the error of the clerk in entering, or of the court in giving the judgment. Cro. El. 491. Palm. 198.

The

* Page 167. Cro. El. 435, 459, 677. 2 Rol. Rep. 471. 8 Co. 162. Moor 407. Rol. Abr. 209. *cent.*

* The inferior court from whence the record is returned, whether it be the *Common Pleas*, or another court of record, may amend after judgment, as well as before a writ of error brought; and the rule of ſuch amendment is to be certified by the clerk of ſuch inferior court to the ſuperior; for a record is removed by writ of error; and a *mittitur recordum* is entered on the roll; yet the writ of error is to ſend the record in the ſtate, and condition, in which it ought to be by the law, and that is corrected, as it ought, from all miſpriſions of the clerks; for by the laws they are to correct the miſpriſions of the clerks before or after judgment; and ſuch corrected records they are obliged to ſend, that the miſpriſions of the clerks may not be taken for their errors; and if they do thus correct the miſpriſion of their clerks after the writ of error has been brought upon the record, it is proper to ſend up their clerks, who are the officers of the court, and have the cuſtody of the records, or they may alledge diminution, and ſend up the record amended, as it ought to be, or it may be amended in the ſuperior court, if the other refuſeth; becauſe ſuch miſpriſions are not to alter the judgment; and therefore the court, that ſuper-intends the inferior court, ought not to correct the miſpriſions of the clerks of the court, in the record ſent to them.

* Page 168. Smith v. Smith.

* But there is this difference, where the clerks carry the rules of amendment to a ſuperior court, and where diminution is alledged, and a *certiorari* thereon iſſues; for where the clerks bring up the roll, it appears to have been mended by the date of the roll after error brought; but when diminution is alledged, they bring up the record *in ſtatu quo*, and the *certiorari* finds it; and therefore when it is brought, they will intend it to be amended at the time of the judgment given, and that the tranſcript firſt ſent up was a diminution and miſtake; and therefore, if dower be brought againſt

againſt an infant, who appears and pleads by guardian, and the judgment is againſt him, *quod ſit in miſericordia*, this is error, becauſe appearing by guardian he ought not to have been amerced; for an infant cannot be amerced for his indiſcretion, nor a guardian, becauſe he is appointed by the court; ſo this is error in the judgment itſelf, which is not amendable; and if certified by the clerks of the court to have been amended after error brought, could not have been amended above, but yet certified to the *certiorari* rightly amended, they will ſuppoſe it was amendable the ſame term judgment was given; and during the term, the judgment being *in fieri*, they can rectify not only the miſpriſions of clerks, but their own miſtakes.

* If on a demurrer joined the judgment is entered, *quod viſis præmiſſis, &c. videtur juſticiariis quod pl'itum præd' minus ſufficien', &c.* and omitting *ideo conſiderat' eſt, quod ille* the plaintiff *nil capiat per breve ſuum, ſit in miſericordia*, and defendant *eat inde ſine die*, this omiſſion ſhall be amended, becauſe there is no judgment returned on the record ſent in anſwer to the writ of error; and then the writ of error itſelf is not anſwered, unleſs the judgment be ſent with the roll; for the writ of error is *judic' inde reddit ſit*, unleſs the judgment be tranſcribed upon the roll in error, the plaintiff in error muſt be *nonſuit*; and therefore it is for the advantage of the plaintiff in error, as well as for the defendant, in whoſe behalf the judgment ſhould be entered upon the record; becauſe if there be no judgment, the plaintiff in error cannot be hurt by ſuch non-entry, nor has he whereof to complain; and therefore for both their advantages the judgment ought to be entered on record. . . . . * Page 169. 2 Saund. 289. Poole v. Longeville.

In debt on bond, after verdict for the plaintiff, the judgment was entered, *quod recuperet* the ſum in the *narr' pro miſ. & cuſtag*, inſtead of *pro deb'* 1 Vent. 132. Raym. 1 Sid. 70.

deb'o præd' and this was ordered to be amended, becauſe *pro miſ. & cuſtag'* is contradictory to the *præd' ſum'*, * which was in *deb'*, and the judgment would have been good without; ſo that they being ſurpluſage, and repugnant to the former words in the judgment, cannot vitiate it.

* Page 170.

An interlocutory judgment may as well be amended as a final judgment; but if there be contradictory reaſons given for the entry of ſuch judgments, and the judgments themſelves, it remains a *quære*, whether it can be amended, becauſe it is ſaid on the one hand, that there being a repugnancy in the material part of the judgment, ſuch act of the court, being in itſelf an inconſiſtency, it cannot be amended; and the reaſon of the judgment being the ground and foundation on which the judgment is given, it is a material part of the judgment, and not mere ſurpluſage, as in the other caſe; and if the paper-book in ſuch interlocutory judgments be right, it is ſaid, it will not amend it, becauſe though the paper-book will amend the pleadings of the parties, ſince ſuch paper book is the *inſtructions of the parties given the clerks to enter*; yet ſuch paper-books are no minutes taken from the court of their interlocutory judgments, and therefore cannot amend ſuch judgments; but on the other ſide it is ſaid, that if the judgment be right, and the reaſon on which the court gave it be not ſo, * yet the judgment itſelf being right ought not to be reverſed for want of rectitude in the judgments themſelves, and not for want of their producing a good or ſufficient reaſon for ſuch judgment.

* Page 171.

Owen 19. Waller's Caſe.

As in the award of a repleader for the error of the defendant's plea, if it is entered *quia pl'itum eſt ſufficien' in lege*, inſtead of *quia minus ſufficiens eſt*, the court held this not amendable, though it was right in the paper-book between the parties: but *Popham* and *Glanville contra.*

If

If any part of the record be vitiated by rasure, the court will reſtore it by amendment, becauſe the wickedneſs of any perſon in corrupting the records of the court ought not to obſtruct the juſtice of the court, or prejudice any of the parties; as *in ejectione firmæ* the leaſe was made 10 *May* after verdict; for though it was made the 11th of *May* by a raſure, and it appearing to the court that the declaration was vitiated by ſuch raſure, they amended it both *com' banc'* and *banco regis*. Ro. Abr. 209. Poph. 196. Latch. 162. 1 Rol. Abr. 208.

It is a general rule, *that though the court will make amendments in favour of judgments, yet if a writ of error be brought, the defendant in error ſhall pay all the coſts of the writ of error*; becauſe, till the record was amended, the plaintiff in error had ſufficient * reaſon to bring the writ; but if he proceeded to reverſe the judgment on any other error, there the defendant ſhall not pay coſts for his amendments, becauſe it is plain, that the plaintiff did not depend on the error the defendant has amended, but on others to reverſe the judgment. * Page 172.

CHAP. XV.

Jury Proceſs.

WE are now come to the award of the *venue*, and the proceſs which is in order to have the *judices facti*, or proper parties to try the cauſe; and here, if that be rightly awarded, the intent of the ſtatute is to make the proceſs thereby amendable.

If

Yelv. 169. If there be a blank left for the county to the ſheriff, whereof the writ ſhould be awarded, yet it will be amended, becauſe it cannot be awarded to the ſheriff of any other county; and therefore it is the omiſſion of the officer in entering the award of the court; but if there were a local plea into another county, ſo that there are two counties * Page 173. mentioned in the pleadings, there the * blank cannot be amended, becauſe there is originally no award of the court to whom the proceſs ſhall go; but where the plea carries the matter, there the venue muſt be from the laſt place, becauſe Cro. El. 26, 468. the declaration by ſuch plea ſtands confeſſed.

21 Jac. I. 3. If the court award the proceſs to an improper officer, yet this is aided after verdict, for that only makes an inſufficiency in the return of the jury; and inſufficient returns are aided; for it was the deſign of the ſtatute, that if the cauſe was tried by a right jury, that it ſhould not be material what officer got them together.

1 Cro. 278. Fines and Norton, but if the 24th man had not been of the 12 that tried the iſſue, it would be aided by the ſtat. *ibid.* If the ſheriff returns but twenty-three on the *venire*, and twenty-four on the *habeas corpus*, and the twenty fourth omitted on the *venire* appears and is ſworn, the verdict will be void; becauſe he is not returned according to the award of the court in purſuance of the *venire*; and therefore has no authority to try the cauſe, for the award to diſtrain one not ſummoned is void, and he is not returned of the *tales de circumſtantibus*, ſo that he is not a proper juror by the writ nor ſtatute.

If the number of the qualifications of the jury be omitted, it ſeems it may be amended by the particular number of the qualifications in each roll, which is directed by the law in all caſes.

* Page 174. * But if the place be totally miſawarded this is not helped by any ſtatute, becauſe they have not the proper *judices facti*, unleſs they have them from the place where the fact ariſes; but if it be only

only miſawarded in part, this is helped by the expreſs words of 21 *Jac.* 13. becauſe it is ſuppoſed, that the perſons, that were near any part of the place might know the fact in iſſue between the parties; but in the ſtatute for amendment of the law the award is at large, *viz. venire facias hic*, becauſe if he takes any out of the county it is ſufficient, for it was found that the perſons in the neighbourhood were generally more partial than ſtrangers.

The award of the *venire* muſt be to a day in the ſame term, or the next term; but it muſt be in term, otherwiſe it is erroneous; becauſe this is not ſuch a diſcontinuance as is aided by the verdict, ſince it is an error in the court in awarding the proceſs, which makes it utterly uncertain when or where the parties ſhould appear to receive judgment; and it is an act of the court which is erroneous, and not a mis-entry of the clerk, which the ſtatutes do not intend to aid. Moor 402, 465.

If a *venire* be of the ſame action and between the ſame parties, all other faults will be amended.

* But theſe are incurable, becauſe by ſuch *venire* they are not, as it appears, the proper judges of the cauſes between theſe parties; for if they do not come from that place, they are not, *judices facti* by the law; if they do not come in the ſame action between the ſame parties, they are not judges in that cauſe; but if the *diſtringas* be right, it is conſtrued by a *venire* omitted. * Page 175. Godb. 194.

But if the number of qualifications be omitted in the *venire*, yet it is ſufficient becauſe that is aſcertained by the law and amended by the roll. 1 Ro. Abr. 204, 205. Danv. 341.

Thus in ejectment where the *venire* was *de pli'to tranſgr'* omitting *ejectione firmæ*, the court held the *venire* to be ill, becauſe it were not in the ſame action; for an action of treſpaſs, and an action of treſpaſs in ejectment are different, 1 Cro. 275, 278. 2 Cro. 528. Hob. 746. Al. Cont.

and there might be an action of treſpaſs between the ſame parties; but if the *diſtringas* had been right, they would have judged this *venire* to have been *null*, and the want of a *venire* is aided by the ſtatute.

Cro. Car. 426. Jones 367. Peffin v. Fenton.

So if on an action of treſpaſs iſſue is joined between the plaintiff and two defendants, and the one dies, and the *venire* is awarded between the plaintiff and both defendants after ſuch defendants death, and verdict is taken for the plaintiff, and the death ſuggeſted on the roll, and judgment * againſt the ſurvivor, the *venire* being only a judicial proceſs, and purſuing the award on the roll, and it plainly appearing to be in the ſame cauſe, and that the trial was laid by proper judges; and judgment being againſt the defendant, who is charged with the whole action, it is good.

* Page 176.

Cro. Car. 275, 278.

But if the *jurata* mentions the iſſue to be *pl'ita tranſgr'*, where the action is debt, and the award of the *venire* and *diſtringas* is debt, this ſhall be amended; for the *jurata* is an award of the *diſtringas* in purſuance of the award of the *venire*, and the *venire* being right, the ſecondary proceſs ought to be accordingly, and there is a ſufficient authority by the writ of *diſtringas*, for the judge of aſſize to try the cauſe.

Cro. Car. 275, 278. 1 Ro. 202.

So if the ſheriff returns *nomina jurat' inter pat' præd' de pl'ito tranſgr'*, where the *venire* is *de pl'ito debi'*, this ſhall be amended; for *in dorſo brevis* he ſays, *executio iſtius br'is patet, &c.* which could not, if it was not the ſame action.

3 Mod. 71. 1 Danv. 340.

So if the *diſtringas* be without the day of *niſi prius*, or mentions a wrong day, if the *jurat* roll be right, the *diſtringas* may be amended by the *jurat* roll.

Cro. Jac. 64. Yelv. 64. Cro. El. 438. 781.

So if the return of the *venire* be miſtaken, this may be amended by the roll; and if the *teſte* of the *venire* be out of term, * and before plea pleaded, it is no error; for the *teſte* of the judicial writs being only matter of form, if miſtaken, yet ſhall

* Page 177. Moor 623, 699. Cro. Car. 90. Noy 58. Moor 465. Cro. El. 202, 365

ſhall not vitiate, ſince they have the proper judges of the fact by ſuch proceſs.

The *nomina juratorʼ* in the *venire* are the proper parties to try the action; and if there be a miſtake in the chriſtian name it is incurable; for the ſtatute does not extend to it, but it extends to cure ſurnames or additions, for there can be but one name of baptiſm, but there may be various ſurnames and additions; and therefore if it can be proved what perſon the ſheriff meant by his ſurname or addition, it may be amended and ſet right.

If the *diſtringas* be omitted or wrong in any of the above particulars, it may be amended by the *venire*; for it is a ſecondary proceſs to bring in the jury; and if the names of the jury, either chriſtian or ſurname, be wrong in the body of the *diſtringas* in the panel returned, or in the panel of the jury ſworn, yet if it can be proved to be the ſame man that was intended to be returned in the *venire*, having there his right chriſtian name, he is the proper *judex facti*, and it may be amended by the ſtatute. 3 Bulſ. 180. 1 Ro. Abr. 196, 197. Hob. 64. 1 Brownl. 174.

If there be ſuch a fault in the *venire* as makes it a perfect nullity, ſo that it has no relation * to the cauſe yet if there be a good *diſtringas*, that being one of the jury proceſs, the omiſſion of the former is cured; for the omiſſion of any judicial writ is aided by the ſtatute; and a *venire*, that is a nullity, and has no relation to the cauſe, is as if there had not been any; and ſo of a *diſtringas* where there is a proper *venire*. * Page 178. Godb. 194. Cro. El. 259.

If on a ſuggeſtion on the roll, proceſs be awarded to the coroners, and then the ſheriff either returns the panel or *tales*, it is erroneous, becauſe not collected by the proper officers; and therefore they are not the proper *judices facti* of that cauſe; and it appears on the record, that the return is otherwiſe than the court hath directed. Cro. El. 581, 574, 586.

Cro. El. 369. Hare v. Brown.

But if the ſheriff after he is diſcharged returns the panel to the *venire*, this is no principal cauſe of challenge, for the ſheriff having returned the *nomina jurator'*, to the court above, on the *venire* on which they have awarded a *diſtringas*, with a *niſi prius* of that return to be controverted before the judge of *niſi prius*, is bound down by a record of a ſuperior court, on whoſe records it appears that he is ſheriff; but the judge of aſſize tries the challenges, becauſe he himſelf ſwears the jury; and though he cannot determine who is the legal officer, becauſe he is bound down, as we have already ſaid, yet he may well try the matter of fact, * if ſuch legal officer be competent to ſummon the jury, ſince it is much better, as we have ſaid, that ſuch matter ſhould be tried at *niſi prius*, than the witneſſes brought up to *Weſtminſter* to determine ſuch fact there; and though the legality of the officer be no principal cauſe of challenge, becauſe it is ſettled above, yet if ſuch panels be favourably returned, you may challenge to the favour and illegality of the officer, as a ſtrong evidence of partial array, ſince a perſon, that had nothing to do with the return, has intermeddled therewith, *viz.* named by the plaintiff or defendant.

* Page 179.

Raſt. 116. b.

Salk. 268. London and Andrews.

The lateſt reſolution is, that the returns of the miniſterial officer are to be challenged at the day of the return; for if the court then admits them to be their officers, and the parties do not except againſt them, they are concluded, ſince the proper *judices facti* are admitted by them to be returned.

Cro. Car. 427. Smith v. Smith, Ro. Abr. 758. ib. 575.

But if the ſheriff that returns his *venire*, be diſcharged before the *teſte* of the *venire*, it is error, and ſhall be tried by the record of the diſcharge; becauſe if the legal officer does not return, the proper *judices facti* did not try the cauſe, and ſo the verdict is ill.

But

But if they assign for error, that though he was sheriff at the *teste*, yet he was discharged before the return, this must be alledged * in the pleadings, and the discharge must be tried by the record of the *Chancery*, certified into the court where the writ of error was returnable; and whether he returned it after his discharge is a matter in *pais*, and must be tried by *pais*, whether these matters may be removed in arrest of judgment at the day in bank, because they had a day in court, at the awarding of the *distringas*, and that seemed to be the proper time to shew the illegality of the returning officer; but on the contrary, if the parties shew any thing before judgment, that would make the judgment erroneous when given, it should seem a proper matter to stay the court from giving judgment. Bro. *ret de brev.* 40. 13 H. 4. 14. * Page 180.

In *London* and *Middlesex* both sheriffs make but one in both counties; and therefore it seems to be a good cause of challenge, if the writ appears to be returned by one sheriff only; and if one of them die, the office is at an end, till another is chosen; the first beginning of this custom seems to be upon the foundation of the charter of king *John*, † who granted the sheriffwick of *London* and *Middlesex* to the mayor and citizens of *London* at the farm of 300*l. per ann.* so that being a grant in fee of the sheriffwick to them as a corporation, they had a right to name one or more officers, * in order to execute the same; and they thought it proper to name two officers indifferently to execute both offices, and both of them execute as one sheriff, though the writ in *Middlesex* is directed to them as one *vic' com' Middx. præcipimus tibi*; in that of *London vice-comitibus* * Page 181.

† *Henry* the first, and not *John*, granted the sheriffwick of *London* and *Middlesex* to the mayor and citizens of *London* at the farm of 300*l. per annum*. See the Customs of the City of *London*, p. 1.

mitibus London' præcipim' vobis; and the reaſon of this difference ſeems to be, that before this grant of the ſheriffwick to the corporation, the corporation nominated to the crown, and the crown appointed the ſheriffs for *London*, and the *London* ſheriffs were reſponſible to the king for the *London* profits of the ſheriffwick; and this was the reaſon why two were appointed, that both might be reſponſible; and this nomination was that the citizens might exhibit to the king reſponſible perſons; and that ſeems to be the reaſon, that in many of the corporations, that are cities and counties, there are two ſheriffs; † but when by the charter of king *John*, the ſheriffwick of *London* and *Middleſex* was granted to the citizens as a perpetual fee-farm, then they entered their ſheriffs, which before were nominated for *London* only, and the election of the two was for both ſheriffwicks, but the directions of the king's writs were as before, *viz.* in *London* to the two ſheriffs, and in *Middleſex* as if there was only one. 3 *Co.* 72. * 1 *Show.* 162, 163, 289. 2 *Show.* 262, 286. *Lev.* 284. *Priv. of* London, fo. 5, 6, 7, 272, 273. *Hob.* 70.

* Page 182.

CHAP. XVI.

Of Imparlance.

IN the *Common Pleas*, they antiently proceeded by original writs, which were warrants out of Chancery for them to proceed; theſe always gave the defendant notice of the cauſe of action; and as he had a view of the writ before he appeared, if he had any dilatory plea, he was to put it

† See the preceding note.

it in immediately; but when he pleaded in chief, and came in towards the end of the term, they gave him time to make his defence, which was called *imparlance.*

But in the *King's Bench,* when the defendant comes in by *latitat,* he does not know till after his *imparlance* what the plaintiff declares for; and as he had no ſight of the bill before-hand, he had time allowed him to plead any plea in abatement, which is called ſpecial *imparlance.*

When the *Common Pleas* proceeded on *clauſum fregit,* which they did when imparlances became common, † or plaintiffs poor, as the defendant was under the ſame * diſadvantages ‡ as when he was arreſted on a *latitat,* he had the ſame privilege to have time to make his objection to the declaration.

* Page 183. 11 Mod. 575.

Hence *imparlance* is,
Firſt, General.
Secondly, Special.

The words of the *imparlance general* are, *petit licentiam interloquendi.* And the words of the *ſpecial imparlance* are, *ſalvis ſibi omnibus & omnimodis advantagiis tam ad breve quam ad narrationem*; and ſometimes thus, *ſalvis ſibi omnibus advantagiis tam ad*

† Imparlance, as it is here called, was a neceſſary indiſpenſable part of the old proceſs in *treſpaſs,* whether the plaintiff or defendant was rich or poor; and the fair common-law reaſon given for it by *Britton,* is, "*que chaque defendant ſoit garny de l' intention de ſon adverſaire.*"

‡ Here the chief baron candidly allows, that the arreſt by *clauſum fregit* in the Common Pleas, and by the *latitat* in the *King's Bench,* did lay the defendant under *diſadvantages.* If the chief baron had ſaid, under unwarrantable oppreſſions in open violation of King *John's* great charter, not only by ſubverting and perverting the antient *proceſs* of the law in treſpaſs, but alſo by an arbitrary and barbarous abuſe of ſpecial bail: if the chief baron had ſtigmatized this proceſs by *latitat* with the *ſeemingly* harſh, but richly merited terms above mentioned, as Sir *Orlando Bridgeman* chief juſtice of the Common Pleas did, when the *latitat* was firſt introduced into the *King's Bench,* he would perhaps have done no more than an honeſt indignation, at the innovation, would warrant.

ad juriſdictionem curiæ, quam ad breve & narrationem, as the caſe is; and the defendant has a *general imparlance* of courſe, but the ſpecial imparlance muſt be obtained from the court.

Three things are to be conſidered in *imparlance*.

Firſt, what muſt be done before *imparlance*.

Secondly, what muſt be done after *general imparlance*.

Thirdly, what after *ſpecial imparlance*.

Lut. 83. *Firſt*, what things muſt be done before *imparlance*; theſe are threefold.

Hard. 365. Lut. 46. 7 H. 6. 39. 22 H. 6. 7. Dy. 210. in Margine. Styles 90. * Page 184. *Firſt*, if a defendant pleads to the juriſdiction of the court, he muſt do it *inſtanter* on his appearance; for if he imparls, he owns the juriſdiction of the court, by craving * leave of the court for time to plead in, and the court ſhall never be ouſted of its juriſdiction after *imparlance*, becauſe the lord might reverſe his judgment by writ of diſceit, and it goes in bar of the action itſelf, (*viz.*) in that court.

Secondly, if the defendant in a plea of land would have *Oyer* of the deed, he muſt demand it before *imparlance*; for by imparling he undertakes to defend the land mentioned in the plaintiff's count, and it would be abſurd in him to defend what he does not know.

Dy. 38. 300. Hob. 62. *Thirdly*, wherever a defendant pleads *ſemper paratus*, as in dower, and tender of money, &c. it muſt be done before *imparlance*; for by craving time he owns he is not ready, and therefore falſifies his plea.

Secondly, what may be done, after a *general imparlance*; two things only, (*viz.*)

Firſt, pleas in ſuſpenſion.

Secondly, pleas in bar.

Lut. 117. Doct. plt. 224. Unleſs the writ abate after *imparlance*, as if a man be excommunicated after the term in which *imparlance* was allowed, ſuch excommunication may be pleaded after *imparlance*.

Thirdly,

Thirdly, what may be pleaded after ſpecial imparlance.

All pleas in abatement, (unleſs to the juriſdiction and privilege) after ſpecial imparlance; * privilege can be only pleaded after a *general imparlance*, becauſe it is neither an objection to the writ, bill, or count. * Page 185.

1 *Sid.* 29. 2 *Ro. Rep.* 244. ſeem to be contrary, and that privilege cannot be pleaded after imparlance; it is not ſaid in either of the caſes, that it was a *ſpecial* or *general imparlance*, and the lateſt reſolution, (*viz.*) *Hardreſs* and *Lutwich* are expreſs in point, that it may be pleaded after a *ſpecial imparlance*, for it does not *ouſt* them of their juriſdiction, but is a privilege, which each court allows the officers of another, to be ſued in their own court.

CHAP. XVII.

Of Pleas.

WE are now come to *pleas*; and here are two things to be treated of, (*viz.*)

Firſt, *defences* in general.

Secondly, the ſeveral ſorts of *pleas*, and the time of *pleading*.

Defence cometh from the word *defendo*, ſo called from the manner of pleading, (*viz.*) *ven' & defend'*, and is twofold.

* *Firſt*, *half defence*, which is *ven' & defend' vim & injur' quando*, &c. the *ven'* is the record of the defendant's coming into court, and is neceſſary to make him a party, but the *defend' vim & injur'*, &c. were not uſed in *clauſum fregits* and *aſſaults*; as appears by the *old entries*, *fo.* 5, 13, 30. So that the * Page 186.

the want of them is not fatal, tho' ſhewn for ſpecial cauſe.

1 Lut. 9. *Secondly*, the ſeveral ſorts of *pleas*, and theſe are threefold, *viz.*

Firſt, *Abatement*
Secondly, *Suſpenſion*.
Thirdly, *Bar*.

Firſt, *abatement*; *pleas in abatement* are, when the defendant ſhews cauſe to the court why he ſhould not be impleaded; or, if impleaded, not in manner and form he now is. As theſe pleas enter not into the merit of the cauſe, but are dilatory, the law has laid the following reſtrictions on them.

4 Ann. c. 16. *Firſt*, by the ſtatute for the amendment of the law, no dilatory plea is to be received, unleſs on oath, and probable cauſe ſhewn to the court.

2 Saund. 41. *Secondly*, no plea in *abatement* ſhall be received after a *reſpondeas ouſter*, for then would they be pleaded *in infinitum*.

Lutw. 178. *Thirdly*, that they ſhall be pleaded before general imparlance.

* Page 187. * *Fourthly*, that when iſſue is joined on them, if it be found againſt the defendant, it ſhall be peremptory.

Pleas in *abatement* are threefold.

Firſt, to the juriſdiction of the court.

Secondly, to the perſon. *Firſt*, of the plaintiff; and *Secondly*, defendant. *Thirdly*, to the writ, and therein,

Firſt, to the form.
Secondly, to the action.

Juriſdictions of Courts.

Firſt, Of *pleas* to the *juriſdiction* of the court, and here three things are to be obſerved.

2 H. 6. 30. 22 H. 6. 7. Hard. 365. 1 Lut. 46. Dy. 210. in Margine. Styles 30. *Firſt*, they muſt be pleaded before any imparlance; for by craving leave to imparl, the defendant ſubmits to the juriſdiction.

Except

Except where antient demeſne is pleaded; for this may be done after imparlance, becauſe the lord might reverſe the judgment by writ of diſceit, and it goes in bar of the action itſelf, (*viz.*) in that court, becauſe it is *coram non judice*.

Secondly, the defendant muſt plead it *in propria perſona*, for he cannot plead by attorney without leave of the court firſt had, which leave acknowledges their juriſdiction; for the attorney is an officer of the court; and if they put in a plea by an officer of the court, that plea muſt be ſuppoſed to be put in by leave of the court.

* *Thirdly*, the defendant muſt make but half defence; for if he makes the full defence, *quando*, *&c.* he ſubmits to the juriſdiction, *&c.* being *quando & ubi cur' conſideraverit*. * Page 188. Co. Lit. 127.

Under this head of pleas to the juriſdiction, it will be neceſſary to make a diviſion of the courts, which, as far as our purpoſe requires, may be divided into,

Firſt, the courts of *Weſtminſter*.

Secondly, the reſt of the temporal courts in *England*.

Firſt, the courts of *Weſtminſter* are the ſuperior courts in the kingdom, and have a ſuperintendency over all the other courts by prohibition; if they exceed their juriſdiction, or writs of error, and falſe judgment; if their proceedings are erroneous; ſo that theſe courts have conuzance of all tranſitory actions, except between the ſcholars of *Oxford* and *Cambridge*, and every thing ſuppoſed to be done within their juriſdiction; unleſs the contrary eſpecially appears. On the other hand, nothing ſhall be intended within the juriſdiction of an inferior court, but what is expreſly alledged; ſo that where an action is brought on a promiſe in a court below, not only the promiſe, but the conſideration of the promiſe, muſt be alledged to ariſe within an inferior juriſdiction; becauſe ſuch inferior courts * are bounded in their original creation, * Page 189.

creation, to cauſes ariſing within the limits of ſuch new erected juriſdiction; and therefore, if a debtor, that has contracted a debt out † of ſuch limited juriſdiction, comes within it, yet they cannot ſue there for ſuch debt; becauſe the cauſe of action did not ariſe within ſuch juriſdiction; and therefore it is not within the limits of their commiſſion to try and determine; for which reaſon the conſideration of the promiſe, which is the cauſe of action, muſt be alledged to be within the juriſdiction of the court; and not only ſo, but it muſt be proved upon the trial; and if the plaintiff proves a conſideration out of the juriſdiction, that cannot be given in evidence; and if it be, the defendant's counſel may propoſe a bill of exceptions, the bill will appear to be erroneous; and therefore the firſt book of *Saunders* 74. in the caſe of *Deacock* and *Beſt*, makes a true diſtinction between counties palatine, and other inferior courts; for the county palatine is a general court, for all the ſubjects of that palatinate, and not merely for the cauſes ariſing within the palatine; for if a debtor goes from the foreign into palatine, his objections go along with him, as much as if he went from one kingdom to another; and if it were otherwiſe a palatinate juriſdiction would be
* Page 190. * a ſhelter and *aſylum* to debtors; for no proceſs but

† The city of London is an exception to this general rule. For when *Henry* the firſt, by his charter, granted that the citizens of London ſhould not plead without the walls of the city in any plea whatever, this was done, as I have before obſerved, in proof of the city of London being newly erected into a *county* of itſelf, and as ſuch, had the charter ſtopt here, it would have been no matter of favor, becauſe, by a preceding law of the ſame king, the *county* of London *qua talis* then ſtood upon the ſame footing in regard to *non-foreign* pleas as all the other *counties* in the kingdom: but this charter goes on, and farther grants "that *all* debtors who owe the citizens of *London* any *debts* ſhall pay them in *London*, or diſcharge themſelves in the city, by ſhewing that they owe no ſuch debts; but if they will not pay the ſame, nor come thither to clear themſelves, the citizens to whom ſuch debts are due, may take *namia*, within that city, borough, or *county*, where he remains who owes the debt.

but the ſupreme prerogative proceſs runs there; and therefore it is truly determined, though the cauſe of action be out of the palatine; yet if the party be a ſubject of that palatine, as he is by coming into that dominion, that the action there may be brought againſt him.

Secondly, of temporal courts in *England*, theſe may be divided into three, (*viz.*)

Firſt, *Courts Palatinate.*
Secondly, *Inferior courts.*
Thirdly, *Courts not of Record.*

Firſt, *Courts palatinate*, which are three; firſt, *Cheſter*; ſecondly, *Durham*, erected by *William* the conqueror; and thirdly, *Lancaſter*, erected by act of parliament in *Edward* the third's time: theſe were ſuperior courts within their juriſdiction, in as ample a manner as a court of *Weſtminſter*, and the king's ordinary writs do not run there.

Secondly, *inferior courts* of record; they are all the king's courts, though another may have the profits, and they ſit either mediate or immediate from the king; and they are either erected by letters patent from the king, or by preſcription; and the proceedings are preſerved on rolls, which are of ſo high a nature, that they are to be * tried by themſelves; only ſome of theſe have franchiſe to hold pleas within ſuch a compaſs, through theſe *breve domini regis non currit.* * Page 191.

Thirdly, courts not of record, ſuch as the court baron, hundred court, and county court.

There are no pleas to the juriſdiction of the courts at *Weſtminſter* in tranſitory actions, unleſs the plaintiff by his declaration ſhews the cauſe of action accrues within the county palatine, or if it be between the ſcholars of *Oxford* and *Cambridge.* Go. 4. Inſt. 213. 1 Sid. 103.

Nor in local actions, unleſs within thoſe juriſdictions, where *breve domini regis non currit.*

For

4 Inſt. 224. For where a franchiſe, either by letters patents or preſcription, hath a privilege of holding pleas within their juriſdiction, if the courts at *Weſtminſter* intrench on their privileges they muſt demand conuzance; that is, deſire that the cauſe may be determined before them; for the defendant cannot plead it to the juriſdiction; and the reaſon is, becauſe a defendant is arreſted by the king's writ; but within a franchiſe, where the king's writ doth not run, he is not legally convened, and therefore may plead it to the juriſdiction; but the creating a new franchiſe does not hinder the writ from having the ſame juriſ-
* Page 192. diction over the cauſe, but grants * juriſdiction to the lord of the liberty; and whenever the king's courts intrench on his juriſdiction, he may make his claim, and demand that the cauſe be determined before him.

So that the pleas to the juriſdictions of the courts at *Weſtminſter* are,

Antient demeſne. *Herne*'s plead. 351.

Held of the king's manor. *Hanſ.* 103. 2.

Counties palatine. *Raſt.* 419. *Herne* 7.

Cinque ports.

We are now come to the privileges that franchiſes by *letters patent, or by preſcription,* have of demanding conuzances of the courts at *Weſtminſter*; and here we will conſider,

Firſt, what courts can demand conuzance.

Secondly, of what and where they ſhall be denied, though the cauſe accrued within their juriſdiction.

Thirdly, the manner and time of demanding it.

Firſt, what court can demand conuzance.

2 Inſt. 140. No court can demand conuzance, unleſs it be of record, becauſe all courts of record are the king's, though another may have the profits of them. *Co. Lit.* 117. *b.* So that although the cauſe goes out of the king's courts at *Weſtminſter*, yet

yet it goes to * another of the king's courts, to which he has granted the privilege of determining the cauſes ariſing within a limited juriſdiction: but it is below the dignity of the king's courts to part with any cauſe to another's court, ſuch as the county court, &c. * Page 193.

Wherever the defendant can plead to the juriſdiction of the courts at *Weſtminſter*, there the franchiſe may demand conuzance, but not *vice verſa*.

Secondly, of what they can demand conuzance, and whether it ſhall be denied, though the cauſe accrued within the juriſdiction.

They have conuzance of local actions; for as to tranſitory actions, the plaintiff may ſuppoſe them to ariſe in what county he pleaſes; but if they are laid in the county palatine, it being a ſuperior court ſhall have conuzance; as if it be between the ſcholars of *Oxford* and *Cambridge* in a tranſitory action, the Univerſity ſhall have conuzance, becauſe by their charter confirmed by act of parliament they ſhall have juriſdiction over the perſons of their ſcholars. 1 Sid. 103.

Firſt, where the franchiſe cannot give a remedy, and there would be a failure of juſtice, it ſhall not have conuzance, although the action accrued within their juriſdiction. Failure of Juſtice.

* As in *quare impedit*, becauſe they cannot ſend a writ to the biſhop; nor in replevin, becauſe, if the plaintiff be nonſuited, a ſecond deliverance ſhall be granted, which the franchiſe cannot do. * Page 194. 4 E. 3. 29. 89. 14 H. 4. 20. Dalt. 12. 31 Ed. 3. 31. Dalt. 12.

Nor in waſte, becauſe by the ſtatute the writ muſt iſſue out of the *Chancery* at *Weſtminſter*, and theſe writs are returnable into the king's courts there; and not into any inferior court.

Nor in admeaſurement of paſture, becauſe the franchiſe cannot grant a writ *de ſecunda ſuper oneratione*. 5 Aſſ. 9.

So

So if a fine be removed out of the franchiſe by writ of error in *B. R.* and a *ſcire fac'* iſſues out to have execution, they ſhall not have conuzance, becauſe the king never parts with the records of his court, and without it they can do no right to the party.

2 Ven. 363. If a ſcholar of *Oxford* or *Cambridge* be ſued in *Chancery* for a ſpecial performance of a contract to leaſe lands in *Middleſex*, the Univerſity ſhall not have conuzance, becauſe they cannot ſequeſter the lands.

22 Aſſ. 83. If a treſpaſs be brought within a franchiſe againſt a foreigner who has nothing within the franchiſe, conuzance ſhall not be granted; for they cannot oblige a ſtranger to anſwer who hath nothing within the franchiſe.

* Page 195. Privilege of Courts. 3 Lev. 149. Lit. Rep. 304. * *Secondly*, and as they ſhall not have conuzance where there is a failure of juſtice, ſo ſhall they not likewiſe where the plaintiff is a privileged perſon in any of the ſuperior courts at *Weſtminſter*; for it would be inconvenient and below the dignity of theſe courts, that the officers ſhould be compelled to quit their attendance, to obtain juſtice in an inferior court.

Cont. Bendl. 233. Bro. Con. 50. But the defendant being *in cuſtod' mar'* in the *King's Bench*, or the plaintiff's commencing a ſuit in the *Exchequer* on a *quo minus* as debtor to the king, are not ſuch privileges as will ouſt an inferior juriſdiction; for they are now grown the common way of iſſuing in thoſe courts.

Han. 509. 14 H. 4. 20. Nor can they have conuzance of ſuch actions which were not in *Eſſe* at the time of their charter, but created ſince by act of parliament.

14 H. 4. 20. 22 E. 4. 22. But if an action of law is given againſt a perſon by another name, as debt againſt an adminiſtrator, they ſhall have conuzance.

Thirdly, the manner and time of demanding it.

Dal. 12. 1 Sid. 183. As to the manner of demanding it by letter of attorney, the letter of attorney muſt be in *latin*, and

and present in court; and if the conuzance be demanded by virtue of a charter time out of mind, or by prescription, there an allowance must be pleaded * before justices in *eyre*. Co. 9. *Abbot de Strat's* case. * Page 196.

As to the time, it must be demanded before an imparlance, and the same term the writ is returnable after the defendant appears, because until he appears there is no cause in court; otherwise there would be a delay of justice; for if conuzance after imparlance when the defendant has a day already allowed him, he would have two days, since when the conuzance is allowed, the franchise prefixes a day to both parties to appear before them; and it is the lord's laches, if he does not come soon enough, so as not to delay the parties. 1 Sid. 103. 6 H. 7. 9. 10. Raft. 128.

We are now come to the second sort of pleas in abatement, *viz.*

To the person of either { Plaintiff / or / Defendant.

1st, *To the person of the plaintiff*; and here are the following disabilities which may be pleaded in abatement of the writ, and the plaintiff shall not be answered until he hath removed them; and therefore by the ancient law he was said to lose *liberam legem*, because he was not *rectus in cur'* until he had removed such impediment. First. As to the person of the plaintiff.

First, outlawry; for until this is reversed, or the king has granted his charter of pardon, * he is out of the protection of the law, because he would not be amenable and attendant to the law, and ought not to have any privilege from it; but none should be outlawed until after the *exigent* be returned; for the inquiring after him in the county is in order that he may appear; and therefore if he does appear at the return of the *exigent* the law is satisfied, and the outlawry must not be recorded against him. First. Outlawry. Co. Lit. 128. Dy. 222, 28. Aff. 49. B. Inability 25. * Page 197.

Doct. plit. 390.

But this diſability is only pleadable when the plaintiff ſues in his own right; for if he ſues *in auter droit*, as executor or adminiſtrator, or as mayor with his commonalty, outlawry ſhall not diſable him, becauſe the perſon whom he repreſents has the privilege of the law; and not ſuing for himſelf, where he has the advantage of another, that is no objection to his repreſentation, or any reaſon why he ſhould not be anſwered.

Co. Lit. 128.

Co. L. 128. Doct. plit. 396. 7 H. 4. 110.

Nor when he brings a writ of error to reverſe an outlawry, ſhall outlawry in that ſuit, nor at any ſtranger's, diſable him; for if he were outlawed at ſeveral mens ſuits, and one ſhould be a bar to another, he could never reverſe any of them; the outlawry itſelf is no objection, for that would be *exceptio cjuſdem rei cujus petitur diſſolutio*; nor is another outlawry pleadable in bar to ſuch writ of error; for then two erroneous * outlawries would be irreverſable; and therefore that is tantamount to *exceptio ejuſdem rei cujus petitur diſſolutio*; ſo if there be an attaint brought on a verdict, outlawry grounded on that verdict ſhall not be pleaded in bar, for the reaſon above.

* Page 198.

Doct. plit. 393. Stamford 103. Fitz. Co. 233.

As this is a dilatory plea, when it is pleaded in another court than where the outlawry iſſued, the defendant muſt bring it in immediately; for this being in delay, if the court ſhould give time, and it ſhould not be brought in, then the delay of juſtice would be from the court, and ſince there is a way of having it immediately, by producing it under the great ſeal, no time ſhall be given to bring it *ſub pede ſigilli*; but otherwiſe when it is in the ſame court, for then the record is already in court.

In pleading outlawry in diſability in another court, the ancient way was to have the record of the outlawry itſelf *ſub pede ſigilli* by *certiorari* and *mittimus*; but this being very expenſive, it is now ſufficient to plead the *cap. utlegatum* under the ſeal of the court from whence it iſſues; for the iſſuing

iſſuing of execution could not be without the judgment; and therefore ſuch execution is a proof to the court that there is ſuch a judgment, which is a proof that the defendant's plea of matter of record is proved by matter of record; and therefore appears * to the court not to be meerly dilatory; and therefore on ſhewing ſuch execution, Co. Lit. 128. Clerk's Entries 14. Doct. plit. Tit. Outlawry. * Page 199.

If the plaintiff will plead *nul tiel record*, the court will give the defendant a day to bring it in; but where you plead excommunication, it is not ſufficient to ſhew the writ *de excommunicato capiendo* under the ſeal of the court, for the writ is no evidence of the continuance of the excommunication, ſince he may be abſoiled by the biſhop, and that will not appear in the king's court, becauſe ſuch abſoilment is not returned into the king's court from whence ſuch *ſignificavit* is ſent; but the reverſal of the judgment of outlawry muſt appear in the ſame court where the outlawry is returned; and therefore the iſſuing of the execution is a ſtrong proof of the continuance of the judgment; and if it is denied on the other ſide, they will give him a day to maintain his plea; but in caſe of an excommunication, the iſſuing the writ is no certain proof of excommunication, even at the time of iſſuing the writ, for he might be abſoiled between the *ſignificavit* and the iſſuing the writ *de excommunicato capiendo*; and therefore there muſt be a certificate under the ſeal of the biſhop to maintain the plea ſince it is dilatory; and the court, on ſhewing only the writ *de excommunicato capiendo*, have no ground to give the de- * fendant time; beſides it is below the dignity of the court to write to the biſhop to ſatisfy dilatories; and there is no way by *certiorari* or *mittimus* to bring it in. Fitz. Cor. 233. 23 E. 4. 16. Doct. plit. 396. * Page 200.

Outlawry in a county *Palatine* cannot be pleaded in any of the courts of *Weſtminſter*; for he is only ouſted of his law within that juriſdiction, and

it ſhall not extend to diſable a man in another county where they have no power; for the county *Palatine* being a royal juriſdiction within bounds, the loſing the privileges of law, within that juriſdiction, can be no diſadvantage to him in another county; and if he does not live within the *Palatine* juriſdiction, he is not obliged to attend there; but it ſeems that outlawry in the county *Palatine* of *Lancaſter* may be pleaded in the courts of *Weſtminſter*; becauſe that county was erected by act of parliament in the time of *Ed.* 3. but *Durham* and *Cheſter* are by preſcription.

12 E. 4. 16.

Wherever outlawry is pleaded, it may always be pleaded in abatement, but not in bar, unleſs the ground or cauſe of the action be forfeited; not in bar in real actions where the land is forfeited, nor in perſonal actions where the damages are uncertain.

Co. Lit. 123. Doct. plit. 395.

Outlawry for felony may be pleaded in bar to all actions concerning lands and tenements, as well as goods and chattels, * for all his lands are forfeited by the felony.

* Page 201.

Outlawry may be pleaded in bar after it is pleaded in abatement, becauſe the thing is forfeited, and the plaintiff has no right to recover.

2 Lut. 1513. 4, 1604. 11 H. 7. 11. 3 Lev. 29.

In real or perſonal actions where the damages are uncertain (as in treſpaſs, of battery of goods, of breaking his cloſe, *&c.* and are not forfeited by the outlawry) there the outlawry muſt be pleaded in diſability of the perſon: but if the ground or cauſe of the action be forfeited by the outlawry, as in action of debt, detinue, *&c.* the outlawry may be pleaded in bar to the action.

Co. Lit. 128. 5 Co. 109. 2 Lut. 1513. Dyer 9. Cro. El. 262.

If outlawry be pleaded either in bar or abatement, and the plaintiff replies *nul tiel record*, and the defendant has a day given him to bring in the record, and in the *interim* the plaintiff removes the record by writ of error, and reverſes the outlawry, though the defendant fails in bringing in the record, yet this ſhall not be fatal and peremptory

Owen 22.

on

on him; for in the firſt caſe he ſhall have liberty to plead a new bar; and in the ſecond, the judgment ſhall only be *reſpondeas ouſter*; becauſe his plea was a true plea at the time of pleading it, and the plaintiff was actually diſabled from ſuing, not having then his *liberam legem*.

* So that outlawry does not abate the writ, but is only a temporary impediment, that diſables the plaintiff from proceeding; for upon obtaining a charter or pardon, or reverſing the outlawry, he is reſtored to his law, and ſhall oblige the defendant to plead to the ſame writ. * Page 202. Co. Lit. 128. Doct. plit. 397.

The ſecond diſability is excommunication, and this cannot be pleaded after general imparlance; for thereby the plaintiff is admitted to be a good plaintiff, but after a ſpecial imparlance it may be pleaded. Second. Excommunication. 9 E. 4. 36. Plac. Gen. 19.

When this is pleaded, the biſhop's letter under his ſeal, witneſſing the excommunication, muſt be ſhewn; and though the plaintiff cannot deny a plea, yet the writ ſhall not abate, but defendant *eat inde ſine die*, becauſe the plaintiff upon producing his letters of abſolution ſhall have a *reſummons* or *reattachment*; if in appeal the defendant pleads excommengeent in the plaintiff, he is let out on main-prize until the plaintiff purchaſe letters of abſolution, for then he muſt plead in chief. Lit. Sect. 201. Bro. Appeal. 50. 141. Bro, Excom. 16. Co. Lit. 135. in Margine. 44 E. 3. 17.

But in other caſes, the writ ſhall abate if the matter pleaded cannot be denied, except outlawry, when the plaintiff purchaſes a pardon before judgment is entered upon the plea or reverſes it by error.

Excommengement is a good plea to an executor or adminiſtrator, though they ſue * *in autre droit*, and the difference between this and outlawry is, that an excommunicate perſon is excluded from the body of the church, and is incapable to lay out the goods of the deceaſed to pious uſes; but the outlaw, though incapable of law Co. Lit. 134. 43 E. 3. 3. Theol. 11. 21 Ed. 4. 49. * Page 203.

for

for his own benefit, may be allowed to do all charitable actions for the ſoul of the deceaſed; and it is one of the effects of excommunication that he cannot be procurator or attorney for any other perſon; and therefore cannot repreſent the deceaſed.

12 Co. 61. Excommunication is no plea on a *qui tam*, becauſe it is for example, and the ſtatute having given the informer an ability to ſue, and not excepted excommunicated perſons from the liberty of informing, he is enabled to ſue by the ſtatute, notwithſtanding the cenſures of the church.

Theol. 10, 11. Excommengement 9. 28 E. 3. 27. 8 Co. 68. Though it be for another cauſe than that in queſtion, the plaintiff ſhall not be diſabled becauſe himſelf is party. When prohibition is brought againſt the biſhop, and he pleads excommunication againſt the plaintiff, and in the excommunication there is no cauſe of ſuch excommunication ſhewn, this is no good plea; for in ſuch caſe it will be intended that the excommunication was for endeavouring to hinder the biſhop's proceeding by application to the temporal court; and if ſuch excommunication were allowed, it would deſtroy all prohibitions, and the plea of * excommunication in this caſe is *exceptio ejuſdem rei cujus petitur diſſolutio.*

* Page 204.

Theol. 11. 30 E. 3. 4. Co. Lit. 134. In an action brought by the bailiffs and commonalty, the defendant ſhall not plead excommengement in the bailiffs, becauſe they ſue as a corporation, and a corporation cannot be excluded from the communion of the viſible church.

Bro. Excom. 3. 3 Bulſ. 72. 20 H. 6. 25. Roll 226 Pl'ita Gen. 10. 172, 73, 74, 75, 76. When excommunication is pleaded in the plaintiff, he ſhall not reply that he has appealed from the ſentence; for the ſentence is in force until it is repealed, and whilſt it is in force he cannot appear in any of the courts of juſtice; but he may reply that he is abſolved, for then his diſability is taken away.

16 E. 3. 31. Excom. 2. 1 Roll. 883. 14 H. 4. 14. Bro. Excom. 17. 22 E. 4. 29. In the times of popery, excommengement certified by the pope, or delegates commiſſioned by him, did not diſable the plaintiff; becauſe the courts had no perſon to whom they ſhould write

to

to have him aſſoiled: and it ſeems by this, that if the ſentence be a nullity, as if they excommunicate for a temporal offence, the king's court will write to the biſhop to aſſoil him; and when the plaintiff brings in the letter of abſolution, the court will oblige the defendant to plead in chief.

The court will not receive the certificate of excommunication of one biſhop from another, becauſe they muſt have the certificate * from the biſhop whoſe ſubject he was; and he might have been aſſoiled by his own ordinary after the firſt certificate to the biſhop. Erc. Excom. 21. Fitz. Excom. 20. 8 Co. 68. Co. Lit. 134. * Page 205.

Nor will they receive a certificate from a biſhop deceaſed, becauſe he may ſtand aſſoiled by the preſent ordinary that now is, after the deceaſe of the biſhop who has certified; and the court will not receive any certificate, but from ſuch perſon to whom they can write to aſſoil. Bro. Excom. 2. Fitz. Excom. 26. 1 Ro. 883.

The third diſability is *alienage*, where one is born out of the king's liegeance; for none ſhall maintain any action either real or perſonal whilſt he is ſubject to an enemy to the king; but this impediment may be removed by being Third Alienage. Co. Lit. 128. Co. Lit. 129.

Naturalized by act of parliament,

Infranchiſed, or by letters patents.

But an alien in league ſhall maintain perſonal actions, or elſe he would be incapacitated to merchandize; but no real or mixed action, becauſe there is no neceſſity that he ſhould ſettle. Co. Lit. 129. Yelv. 198. 1 Bulſ. 134.

If it be pleaded in an alien in league, that muſt be in diſability of the plaintiff; but if it be an alien enemy, it muſt be pleaded to the action, becauſe it is forfeited to the king, as a reprizal for the damages committed by the dominion in enmity with him. Bro. Denz. 10. Co. Lit. 129.

* But an alien enemy that is prior, may ſue for the convent, becauſe he ſues in his corporate capacity, and not to recover for himſelf, or to carry the goods or effects out of the land. * Page 206. Co. Lit. 129.

It

Cro. El. 142. Wentworth Executors 22. Owen 45.

It has been long doubted, whether an alien enemy ſhould maintain an action as executor; for on the one hand it is ſaid, that, by the policy of the law, alien enemies ſhall not be admitted to actions to recover effects which may be carried out of the kingdom, to weaken ourſelves, and enrich the enemy; and therefore public utility muſt be preferred to private convenience; but on the other hand it is ſaid, theſe effects of the teſtator's are not forfeited to the king by way of repriſal, becauſe that they are not the alien enemies, for he is to recover them for others; and if the law allows ſuch alien enemies to poſſeſs the effects as well as an alien friend, it muſt allow them power to recover, ſince that there is no difference, and by conſequence he muſt not be diſabled to ſue for them; if it were otherwiſe, it would be a prejudice to the king's ſubjects who could not recover their debts from the alien executor, by his not being able to get in the affets of the teſtator.

Molloy 370. 1 Danv. 325. Cro. El. 683. Moor. 431. Charter 49, 191. Richfield and Ux. v. Udal.

Fourth. Præmunire.

The fourth diſability, is when a man has judgment given againſt him on a writ of * *præmunire facias*, or is attainted of high treaſon or felony.

* Page 207.

Fifth. Recuſancy.

The fifth diſability, is popiſh recuſancy convict; becauſe 3 *Jac. cap.* 5. diſables to all intents, as excommunication, except where he ſues for lands, tenements, leaſes, annuities, rents, and hereditaments, or for the iſſues and profits thereof, which are not to be ſeized into the king's hands, his heirs or ſucceſſors.

Levinz. Ent. 10. adjudged good plea, *vide etiam* 3 *Lev.* 2.

Second. Perſon of defendant.

We are come now to the *ſecond* ſort of plea in abatement, to the perſon, (*viz.*) *to the perſon of the defendant*; and under this head it will be neceſſary to conſider the privilege that the courts at *Weſtminſter* give to all ſuitors in general, and their own officers and ſervants in particular.

As

As the courts of juſtice are open to all, ſo the law protects the perſons of thoſe who come to attend them both in going thither and returning; but in this caſe the defendant muſt appear in perſon, that the court may examine him, and that they may be ſatisfied upon his oath, that he was either proſecuting or defending ſome ſuit pending in that court, when he was arreſted. 2 H. 7. 2. 2 Rol. Ab. 272. 1 H. 6. 3. 38 H. 6. 30.

So if the court gives either plaintiff or defendant leave to go after evidences in * any cauſe depending in that court, and he be arreſted, he ſhall have privilege. 2 Ro. Ab. 272. 13 H. 4. 1. * Page 208. Fitz. *Corpus cum cauſa* 21.

But if he goes without the permiſſion of the court he ſhall not be protected; for the court will then preſume it to be only an excuſe to get free from the arreſt. Eod.

The courts not only protect the perſons of their attendants, but likewiſe all the things that are neceſſary for his journey, or the defence of his ſuit, but not merchandizes or goods for ſale or traffick. 2 Rol. Ab. 273. 3 H. 6. 4.

If an action of debt be brought in the courts at *Weſtminſter*, and the defendant is arreſted a ſecond time in the ſame action by proceſs out of *London*, and the defendant ſues an *habeas corpus*, and it appears to the court, that it is the ſame plaintiff, defendant, and action, and the plaintiff being called is *nonſuit* in the firſt action, yet the defendant ſhall be diſcharged, becauſe at the time of ſuing out the ſecond action they were legally attached in the ſuperior courts; and therefore the defendant ought not to have been drawn from thence to anſwer the ſame action at the king's ſuit; for as the executive power is lodged in the king, it would be unreaſonable that this court, which gives relief to private perſons, ſhould protect any ſubject from being brought to juſtice for offending againſt the laws, which concern the whole common-wealth; * the courts not only protect the parties themſelves, but all witneſſes are protected 2 Ro. Ab. 274. 12 H. 4. 24. Prio' Brockett Fitz' Corp' *cum cauſa* 20. 2 Ro. Ab. 274. Bro. Superſed. 3 H. 6. 44. * Page 209. 1 Moor 66.

tected *eundo & redeundo*; for ſince they are obliged to appear by the proceſs of that court, they will not ſuffer any one to be moleſted, whilſt he is paying obedience to their writ.

Officers. The particular privilege, which the officers of each court enjoy, is, not to be drawn out of their own court, to be impleaded elſewhere; for as their attendance is conſtantly to diſpatch the buſineſs of the court to which they belong, if they might be ſued in any other place, their cauſes muſt ſuffer, becauſe they could not be ſpared from their own court to defend them.

2 Inſt. Clericalis, 32 to 33. Whenever therefore he is impleaded out of his own court, he ſhall ſay, that he is attorney, *&c.* of another court, and conclude with *unde ne intendit quo cur', &c. hic pl'tum præd' verſus eum cognoſcere velit & debeat, &c.*

Exceptions. But this is to be underſtood, when the plaintiff can have the ſame remedy againſt the officer in his own court, as in that where he ſues him; for if money be attached in an attorney's hands by foreign attachment in the ſheriff's court in *London*, he ſhall not have his privilege; becauſe in this caſe the plaintiff would be remedileſs; for the foreign attachment is by the particular * cuſtom of *London*, and does not lie at common law; ſo that if the attorney ſhould have his privilege, the plaintiff ſhould be without his redreſs.

Firſt. Not ſame Remedy.

* Page 110.

1 Saund. 67. So if a writ of entry, or other real action be brought againſt an attorney of the *King's Bench*, he cannot plead his privilege; becauſe, if this ſhould be allowed, the plaintiff would have a right without remedy; for the *King's Bench* hath not cognizance of real actions.

Ib. 16. So if an attorney of the *Common Pleas* be ſued in an appeal, he ſhall not have his privilege; for his own court hath not cognizance of this action, and by this protection he ſhould go unpuniſhed.

It

It has been held by ſome of the books, that this may not be pleaded after imparlance, becauſe by imparling he affirms the juriſdiction of the court, which by this plea he would ouſt. Bro. Br. 25. 9 Ed. 4. 53. Br. 15. 22 H. 6. 71.

But in all theſe caſes (except 22 *H.* 6. 71.) it is not ſaid, whether it was a ſpecial or general imparlance; and after a general imparlance, it is certain, it cannot be pleaded, for the defendant then muſt plead in chief.

22 *H.* 6. 71. there was a ſpecial imparlance, &c. (*viz.*) *ſalvis omnibus allegationibus & exceptionibus omnimodis, tam ad breve quam ad narrationem*, and the court would not allow the defendant privilege: becauſe * ſays the book, by imparling he has admitted the juriſdiction of the court; but the true reaſon of that reſolution ſeems to be, that by this imparlance he has confined himſelf to take advantage only of the defect in the writ and count; but had he obtained from the court a *general ſpecial* imparlance, (*viz.*) *ſalvis omnibus & omnimodis advantagiis & exceptionibus*, he might then have pleaded his privilege; for that is not to ouſt the court of their juriſdiction, but is a privilege which each court allows to the officers of the other to be ſued in their own court only, and the modern authorities are expreſs, that privilege may be pleaded after a general ſpecial imparlance. Bro. 15. * Page 211. 1 Ro. Ab. 275. Han. 365. Lut. 116.

But the privilege, which the court indulges their officers with, is reſtrained to the ſuits only, which they bring in their own right, for if they ſue or are ſued as executors or adminiſtrators, they then repreſent common perſons who have not that privilege; ſo that when an attorney is ſued as executor or adminiſtrator, he may be impleaded in another court; for he is ſued as *in auter droit*. Gage's Caſe. Hob. 177. Second. In auter droit.

So if an officer of one court ſues an officer of another court, the defendant ſhall not plead his privilege; for the attendance of the plaintiff is as neceſſary 20 Ro. Ab. 274. 2 Mod. 193. Hambleton and Screggs.

neceſſary in his court, as the defendant in his; and therefore the * cauſe is legally attached in the court, where the plaintiff is an officer.

* Page 212.

The original reaſon † of privilege, as is mentioned, was becauſe the attornies and officers of the court were obliged to attend the court, and to do their buſineſs there; this is a real reaſon why an attorney ſhall not be drawn out of *Weſtminſter-hall* into inferior courts; for they cannot attend the buſineſs of the courts of *Weſtminſter*, and a ſuit brought againſt them in the country; this was likewiſe a good reaſon in relation to the *King's Bench*, and *Common Pleas*, and *Chancery* in its original; for the *King's Bench* and *Chancery* being ambulatory with the king, *ubicunque fuerit in Anglia*, if the officers of each court were drawn by ſuits into the other, it might be a prejudice to the buſineſs of the *Common Pleas*.

So if a privileged perſon brings a joint action with others, he loſes his privilege in this caſe, becauſe the others, are not officers of the court, nor intitled to the attachment which the court grants to their own miniſters.

Dyc. 377. Godb. 10. 1 Vent. 288, 289. 2 Mod. 297. 298. 1 Ro. Ab. 275. 14 H. 4. 21. 20 H. 6. 32.

So if an action be brought againſt him and others, he ſhall not have his privilege, for he would then deſtroy the plaintiff's action; for the plaintiff muſt ſue the others by original writ, and him by petition to the juſtices; but this is to be underſtood where * the action is joint, and cannot be ſevered; for if the action can be ſevered without

* Page 213.

† Though the Chief Baron gives the reader the *original* reaſon of the privilege here in queſtion, yet he does not mention a ſingle word about the *origin* of the privilege, ſo that the readers are left in the dark as to the *time* when this privilege was firſt pleadable by an attorney in the court. Certain it is, that *Britton*, who has written the cleareſt and moſt methodical treatiſe of the laws and proceſſes of our law-writs, is totally ſilent with reſpect to this privilege. It ſeems to be of no very ancient date, as the modern nonſenſical jargon of a *general ſpecial* imparlance (mentioned in the preceding page) ſufficiently indicates.

without doing any injury to the plaintiff, the officer ſhall have his privilege.

If an attorney of the *Common Pleas* be *in cuſtodia marſhalli* for want of bail at the ſuit of *A.* he may plead his privilege; for though he be taken upon bill of *Middleſex*, or *latitat*, and in a common perſon's caſe if he were brought in by ſuch proceſs, he is to anſwer to the plaintiff's demand againſt him by bill, and not to the proceſs that brought him, yet ſince *actus legis nemini faciat injuriam*, ſuch fictitious treſpaſs to bring the party to appear ſhall never ouſt the attorney of his real privilege.

But if he be *in cuſtod' Mar'* at the ſuit of *A.* and *B.* declare againſt him *in cuſtod' mar'* he ſhall not plead his privilege againſt *B.* becauſe *B.* declares againſt him collaterally as he is in priſon at the ſuit of *A.* and as to *B.* he is truly *in cuſtod' mar'*; for being once ouſted of his privilege at the ſuit of *A.* he can no longer attend as an attorney in the other court, but is fixed in the *King's Bench*, and therefore cannot by the ſuppoſition of the neceſſity of his attendance ouſt the plaintiff of his action. 2 Ro. Ab. 275.

The court not only privilege their own officers, but likewiſe the tenants and attendants of their officers, that they ſhall not * be impleaded, but in the court where their maſters are attendants; but it muſt be in ſuch ſervants as are neceſſary to them in their attendance; for they ſhall not have the privilege for any others. Bro. pr. 8. * Page 214. 34 H. 6. 15.

Thus the plaintiff may reply, that the defendant is ſervant of an officer in the court; but that he is huſbandman in the country, and traverſe, that he is ſervant to the officer, on his attendance to the court. 34 H. 6. 15. Bro. Traverſe 27.

We come now to other pleas in abatement of the writ itſelf; and the firſt of *miſnomer*, ſince the names are the only marks and *indicium* of things, that human kind can underſtand each other by, if the Miſnomer.

the name be omitted or miſtaken, there is a complaint made againſt no body; that is, no complaint at all made; therefore we muſt firſt ſee, what the law is, if the name be omitted.

Firſt, In declarations.

Secondly, In grants and obligations.

As to the miſtake of the name,

Firſt, In declarations, if the name be omitted on the giſt of the action the action the declaration is bad; but if ſome thing be omitted, as the lach of the names to what was formerly ſaid, yet is not the declaration bad,

Cro. El. Law & Saunders 913. * Page 215.

J. Law in an *aſſumpſit* declares thus, *J. L. Queritur de* Thom Saunders, *&c. eum in conſideratione, quod idem* J. L. would * marry the daughter of the ſaid *Thomas Saunders, ſuper ſe aſſumpſit* to pay him 100*l.* the declaration is bad, though after a verdict, becauſe it does not ſay, *præd'* Thomas Saunders *ſuper ſe, &c.* for no body is expreſly charged with aſſuming, and when it is indifferent whether there be any injury or no, it is not by the court to be ſuppoſed.

Cro. Jac. Watt's Caſe 152.

But if the plaintiff counts againſt *J. S.* as ſeized of the manor of *Dale*, and *J. S.* levies a fine of the manor of *Dale*, without ſaying *præd'* J. S. or *de maner' præd'*, this after verdict ſhall be taken to be ſo, for he being named to be ſeized, and this by verdict being found, it is neceſſary it ſhould be intended the *J. S.* mentioned; for here it cannot poſſibly be taken indifferently either way.

Secondly, In grants and obligations, if either the chriſtian or ſurname be wholly omitted, it may be ſupplied by averment: if there be no chriſtian name, there is no repugnancy to any other name, but that it may be averred; of which ſee hereafter.

Thirdly, As to the miſtakes of names it is to be known firſt, what names may, or may not be miſtaken,

miſtaken, and who ſhall take advantage of that miſtake.

Firſt, What name may, or may not be miſtaken, is, only here to be conſidered; for who may or may not take advantage of * that miſtake, will fall under pleas to the writ. * Page 216.

And *Firſt*, as to miſtakes in the names themſelves; *Secondly*, in the additions.

Firſt, As to the names themſelves; and they are twofold, either of natural perſons, or of bodies politick.

Firſt, The names of natural perſons are again twofold, chriſtian and ſurnames.

Firſt, Chriſtian names; and here it is to be conſidered, if it be wholly miſtaken; *Secondly*, if it be truly put at firſt, and varied from afterwards.

Firſt, If it be wholly miſtaken; and this is regularly fatal to all legal inſtruments, not only to declarations, but grants and obligations; alſo the reaſon is, becauſe it is repugnant to the rules of the chriſtian religion, that there ſhould be two chriſtian names, for that allows no rebaptizing; therefore you cannot declare againſt the party but by that name in the obligation, and bring in his true name by an *alias*; for that ſuppoſes the poſſibility of two chriſtian names, and you cannot declare againſt the party, and aver he made the deed by his wrong name; for that is to ſet up an averment contrary to the deed, and there is that ſanction allowed to every ſolemn contract, that it cannot be ſuppreſſed but by a thing of equal validity; and if he be impleaded * by the name in the deed, he may plead that he is another perſon, and that is not his deed. * Page 217.

Cro. Jac. 558, 640. Hale *ſuper* Lit. 3. Owen 107. Dy. 279. *al' cont. vide* 36 H. 6. 26.

And therefore if *Edward* obliges himſelf by the name of *Edmund* and is ſued by the name of *Edward*, with an *alias dict'* of *Edmund*, it is error: and though a perſon cannot have two chriſtian names at one and the ſame time, yet they may, according

Co. Lit. 3. 2 Ro. Ab. 135. 9 E. 3. 454. 46 E. 3 22. 22 R. 2. 936. 3 H. 6. 26. 1 H. 7, 29. 34 H. 6. 19.

12 Ro. 2. 58. 2 H. 6. 26. Vid. Tit. Err.

according to the inſtitution of the church, receive one name at their baptizing to make double names, yet it doth force a man to abide by the name given him by his god-fathers when they come themſelves to make profeſſion of religion.

Firſt exception to this rule is in caſe of felony, for it is ſaid at common law, if a perſon be indicted by a wrong chriſtian name, yet he ſhall not plead *miſnomer* to the felony; for the firſt is ſworn againſt the party preſent, and appearing to their view, and ſo no injury by the *miſnomer*, as might be where the party appears by attorney, and felons generally go by no certain name, and have no fixed habitation; and therefore is altered by the ſtatute of additions.

2 Inſt. 665. 1 H. 5. 5. 6.

Second exception is in grants, which is where there are ſuch ſufficient marks of diſtinction that the grant would be good without any name at all, and when there is a ſufficient expreſſion and ſpecification of parties, whatever is redundant and over and above, like all other ſurpluſage, though * miſtaken, cannot hurt and deſtroy the force of the grant, according to the rule *utile per inutile non vitiatur*; and therefore a grant to *George* biſhop of *Norwich*, where his name is *John*, or to *Henry* earl of *Pembroke*, where his name is *Robert*, or to *Emmy* the wife of *J. S.* where her name is *Emelyn*, it doth not vitiate.

* Page 218.

Co. Lit. 3. 11 Co. 21.

Idem ib.

But in pleading, in theſe caſes, the chriſtian name ought to be ſhewn; for the death of the individual is a good plea in abatement, which often falls out where the ſame office, dignity, or relation, continues in another.

3 Leon. 18.

The third exception is on a deviſe, tho' the chriſtian name be miſtaken, that if there be a ſufficient ſpecification of the party, the deviſe is good, becauſe it muſt be conſtrued according to the intention of the deviſe.

And

And therefore if a deviſe be made to *Abraham* the eldeſt ſon of *B.* where his name is *William*, this is a good deviſe.

Fourthly, if a man is impleaded by his wrong name, and upon the plea in bar pleaded, judgment is given for the defendant; if he be afterwards impleaded by his right name, he may plead in bar the former judgment, and aver that he is *un' & ead' perſona*, for no man ought to be forced to take advantage of the *miſnomer*. Hill. 8. Gul. Reg.

* *Secondly*, the ſecond thing to be conſidered is, if the name be truly put at firſt, and afterwards varied from; and this matter is to be conſidered in conveyances, declarations, and judgments. * Page 219.

Firſt, In conveyances, in fines or feoffments, the change of the real chriſtian name into another name doth not avoid it; for there is no apparent miſtake of the clerk, and charters receive a benign interpretation, and moſt againſt the grantor. Hale ſuper Lit. 1 Aſſ. pl. 3 Aſſ. 4. 34 H. 6. 9.

Secondly, In declarations, and other judicial records; and here are theſe diverſities.

Firſt, If two names are in original derivation the ſame, and are promiſcuouſly to be the ſame in common uſe, tho' they differ in ſound, yet there is no variance; as *Piers Griffith* brought an *audita querela*, and outlawry was pleaded by the name *Peter Griffith*, and allowed. Cro. Jac. 425. 2 Ro. Ab. 136.

Saunders and *Alexander*	The ſame Names.	2 Ro. Abr. 125, 6. Cro. Jac. 584. 1 Leon. 147. 2 Cro. 23.
Joan and *John*		
Jane and *Jone*		
Garet, *Gerad*, and *Gerald*		
Franciſcus and *Francis*		
Randel and *Rannus*		

Secondly, If there be two *Engliſh* names that are diſtinct, and one *Latin* name for * them both, this makes no alteration in the record; as *James* and *Jacob* are two *Engliſh* names, and for them Cro. Jac. 534. 2 Ro. Abr. 136. * Page 220.

there is one *Latin* word, *viz. Jacobus*, a direction to *Jacob. vice-com.* the return was *reſpond' Jacob'*; and well enough.

Thirdly, There is a ſubſtantial variance in ſound, original, and common uſe, that is not amendable.

Cro. Jac. 435. 2 Ro. Abr. 135. As if a man declares againſt *J. S.* and *Agnes* his wife, and the record of *niſi prius* is *Anne* his wife, this is a material variance, and not amendable.

Cro. Jac. 425. 1 Leon. 232. Cro. El. 656.	*Ralph* and *Randall* *Randulphus* and *Randalphus* *Sibyll* and *Iſabell*	Different names Diſtinct names.

Thirdly, Judgments; and when it hath appeared to be a miſpriſion of the clerk, it hath ſometimes been amended, and ſometimes not, leſt there ſhould be miſtakes in execution, and becauſe they ſay judgments are the acts of the court, and not of the clerk, and ſo not within the ſtatute that gives them power to amend the errors of the clerk.

Hob. 327. Cro. Jac. 662. Declaration of *John White* againſt *Thomas Wheeler*; judgment *quod Thomas recuperit* amended and made *John*.

* Page 221. * Declaration againſt *Thomas*, and judgment againſt *John* was amendable.

Cro. El. 400. Declaration againſt *Sibyll*, and judgment againſt *Iſabella* is error.

Moor 866. 16 & 17 Car. 2. 18. The ſtatute of *Car.* 2. ſays that judgment ſhall not be reverſed for any miſtake in chriſtian and ſurname in any declaration, plaint or pleading. Q. whether this extends to judgments?

Secondly, We come now to the miſtakes of ſurnames,

Firſt, When it is wholly miſtaken.

Secondly, When there is a variance.

When wholly miſtaken.

Firſt, In grants and obligations.

Secondly.

Secondly, In judicial proceedings.

Firſt, In grants and obligations, the miſtake of the ſurname doth not vitiate, becauſe there is no repugnancy that a perſon ſhould have two different ſurnames, ſo that he may be impleaded by the name in the deed, and his real name brought in by an *alias*, and then the name in the deed he cannot deny, becauſe he is eſtopped to ſay any thing contrary to his own deed; for that is what they call an abſurdity to deny that which the party himſelf has formerly admitted; and he cannot with ſucceſs deny his real name, as an obligation of *John Gate* where his name of *Gope* is good.

Hale ſuper Lit. 3. 3 H. 6. 25. 2 Ro. Ab. 146.

* The declaration muſt be of the name in the obligation with an *alias* of the real name, for the declaration, as is ſaid, muſt ſhew the cauſe of complaint, as it is; therefore it muſt in all things follow the obligation, and the intent of the *alias* is only to ſhew he has been differently called from the name in the obligation; and therefore if a man oblige himſelf by the name of *J. S.* Eſq. and afterwards he is made a knight, the plaintiff cannot declare againſt *J. S.* knight, *alias J. S.* Eſq.

* Page 222. Dy. 279. 1 Bulſ. 216.

But a miſtake in a letter has been allowed amendable; as if a man bind himſelf in a bond by the name of *William Saxes*, and the obligee declares againſt him by the name of *William Saxey*, alias *Saxes*, this is good enough, and not error, becauſe the judges have a power to amend literal miſtakes.

Saxey and Wempſton. 1 Bulſ. 216.

But where a man makes an obligation to a corporation by a wrong name, they ſhall declare by their right name, and alledge that the obligation was made to them by the other name.

Co. 10. Rep. 125.

Secondly, in declarations and pleadings, the ſurname ought to be ſhewn.

Here the judges have power to amend the miſtake of a letter if the record be before them; but the miſtake of a letter may be very fatal to a juſt

Cro. El. 45. Tranſon and Delamere.

cauſe, if the record be not before them; as if *A.* Page 223. brings an * *aſſumpſit* againſt *B.* and declares he was bail for him at the ſuit of *William Adderby*, and the defendant aſſumed to ſave him harmleſs, and that the plaintiff was taken in execution, and paid the debt; upon *non aſſumpſit* pleaded it was found that the defendant was arreſted by the name of *William Adderby*, but they declared againſt by the name of *William Adderly*, and the plaintiff became bail for him, *&c.* in this caſe the opinion of the court was, that the defendant was not chargeable; for *Adderby* and *Adderly* ſhall not be intended the ſame perſon, at whoſe ſuit the plaintiff became bail; for the verdict hath no credit againſt a record; and therefore it cannot reconcile the difference that appeared between the records; but in this caſe if it had been before the court, it might have been amended.

Secondly, As to the variance of ſurnames.

Firſt, In judgment; if the ſurname in the judgment differs from the ſurname in the declaration, yet it ſhall be amended; for in judgment the chriſtian name need only to be mentioned, and the ſurname is redundant, and then *utile per inutile non vitiatur*; as if a declaration be againſt *John Morgan* Cro. El. 865. Hob. 327. Cro. Inſt. 632. *Wolfe*, and the judgment be againſt *John Morgan*, this is well enough; ſo if a declaration be againſt * Page 224. *Henry Skinner*, and * judgment be entered *quod Henricus Joiner recuperet* 10*l.* aſſeſſed by the jury, and 5*l. eidem Henrico Skinner de incremento.*

Cro. El. 57. Deply and Sprats. 5 Co. 42. *Secondly*, The variance of the ſurname in the proceſs to the ſheriff deſtroys not the verdict; otherwiſe it is in the variance of the chriſtian name; for when any man is named by two different ſurnames, as by law he may have; therefore if a *venire fac'* be to one by the name of *George Thompſon*, and in the *diſtringas* he be named *Gregory Thompſon*, and he appear and is ſworn, the verdict is not good; but if there be two different ſurnames

ſurnames in the record, they ſhall be intended his real names; and then the verdict ſhall not be awarded; as if a man be named in the *ven' fac' Thomas Barker* of *B.* and he appears and is ſworn, and tries the iſſue, the verdict is good notwithſtanding.

Secondly, The names of corporations and all bodies politick being artificial men formed by the king, he gives name in the ſame patent, and how far they may vary from it on their grants and obligations to and from themſelves, and in deviſes to them, and in declarations and pleadings, is to be conſidered.

Firſt, In their leaſes, grants, feoffments, and obligations, *&c.* and here the differences * are to be obſerved between their names, and the names of natural perſons. * Page 225.

The names of men at this day are only ſounds for diſtinction ſake, though they perhaps originally imported ſomething more, as ſome natural qualities, features, or relations; but now there is no other uſe of them but to mark out the families or individuals we ſpeak of, and to make them known from all others.

But the names of corporations are not arbitrary ſounds merely ſo individuative, but have a certain and ſignificant meaning; and if that be kept to, though the words and ſyllables be varied, yet the body politick is very well named, for then there is enough ſaid to ſhew that there is ſuch an artificial being, and to diſtinguiſh it from others.

Secondly, The names of corporations are given of neceſſity, for the name is as the very being of the conſtitution, and though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; and it is no body to plead and be impleaded, to take and give, until it hath got a name; but natural perſons can take before

1 Leon. 163; Lock. 242.

Hob. 88.

2 Co. 5. 1.

before they come into being, and when they are in being, before they have got a name; as a remainder may be limited to the eldeſt ſon of *F. S.*

* Page 226. but if a * remainder be limited to ſuch a corporation as the king ſhall next erect, this is not good, though a corporation be erected before the particular eſtate be determined; for this body of men are only capable of taking by the name in the patent.

Theſe names of corporations are uſually taken from five things.

From the perſons of which they conſiſt.

From the uſe and deſign of their being.

From the names of the patrons that firſt procured their juriſdictions.

From the place where they reſide, and,

From the names of Saints, *&c.*

11 Co. 11, 16. 20, 21, 125. *Firſt.* From the perſons of which they conſiſt; and here they note, that if the name be expreſſed by words *ſynonymous*, it is ſufficient; as if a college be inſtituted by the name of *guardianus & ſcholares domus five collegii ſcholarum de Merton*, and they make a leaſe by the name of *cuſtos & ſcholares*, good; ſo if the grant be made by *præpoſitus & ſocii*, where it ſhould be *ſcholares*, it is good.

10 Co. 125. So if *J. S.* abbot of *B.* makes a leaſe by the name of *clericus de B.* well enough.

If there be a corporation founded by the name of *Mayor & Burgenſes burgi dom' regis*, an obligation is made to them by the name of *mayor & burgenſes de Linne regis, &c.* without ſaying *burgi dom'*

* Page 227. *regis*, and * this was allowed a good obligation; for the parties are ſufficiently expreſſed, and all boroughs † are founded by the king.

Guardianus

† A *borough*, technically ſpeaking, is nothing more than a *decennary*; where three, four or more decennaries have collected themſelves into one ſpot, or *walled* town, ſuch town takes the name of a borough-town. When I ſay decennary, I mean that ſpecies, where each of the decenners are ſtanding bail or ſureties for one another.

But

Guardianus for *guardian* well enough, but they are an aggregate body. 3 Leon. 18.

Secondly, their name is taken from the end and deſign of their being.

If an houſe be founded by the name of *miniſter Dei pauperis domus*, and a releaſe be made by the name of *miniſter pauperis domus Dei*, this is well enough, for the main deſign is ſpecified by both names. Hob. 124.

But if a houſe be founded by the name of *guardiani & ſcholarum domus ſive collegii de Merton*, and a leaſe be made by them by the name of *guardianus & ſcholarus domus ſive collegii de Merton*, this is no good leaſe; for it is a material variance of the name, ſince they have not expreſſed the deſign of the houſe, which is a ſubſtantial part of the name. 10 Co. 125. Fiſher v. Boiſe.

But if a college be inſtituted by the name of *aula ſcholarum reginæ* to be governed by a provoſt, and they are confirmed by the king by the name of *præpoſitus & ſcholarus aulæ reginæ*, and they make a grant of that advowſon by that name, this is good; for that college would never have a name according to the words of the firſt charter; for then it would be a ſole corporation, which is contrary to the general convenience * of ſuch a body; for the name would be *præpoſitus ſcholarum aulæ reginæ*, which cannot be intended, and the word *ſcholares* is not required, as in the former caſe, and the placing where it is, confirms the eſtabliſhment; and Co. Arras's Caſe. * Page 228.

But there is another ſpecies of boroughs, and that is where a Lord having his own court of Sac, Soc, *&c.* is ſurety for all his ſervants dwelling *in ſuo proprio plegio*, and yet the family is ſo numerous as to conſtitute as it were a town of itſelf, and this is the origin of theſe boroughs, which we ſtill continue to ſay are held by *burgage tenure*, which is a baſe tenure, and of which fees, as *Brittan* ſays, "*nul gard ne append. mais nurture ſeulment, et dont les guardeyns ſont pluſeurs* ſervants, *que guardeyns.*"—It is of this *inferior* ſort of *burgeſſes*, to which the 20th *H.* 3. *c.* 6. alludes, where it is enacted, that ſuch lords as diſparage their wards, by marrying them to "*Villanis, vel aliis, ſicut* Burgenſibus *(ſuis) ubi diſparagentur*," ſhall loſe the wardſhip of ſuch heirs.

and confirmation of the king, and common appellation are good interpreters of the original intent of the name.

Thirdly, The names of corporations are taken from the names of the patrons, that procured the juriſdiction, or that have endowed them.

1 Rep. 124. *Edward* 4. incorporated the deans and canons of *Windſor* by the name of the king's free chapel of *St. George the martyr*; and in the time of *William* and *Mary* they made a leaſe by the name of the dean and canons of the king's and queen's free chapel, *&c.* this is a material miſtake of the name; for it takes its name from the founder, that is here miſtaken, and the name of a different one ſubſtituted in its room.

Fourthly, Their names are taken from the places, where they reſide, for a corporation has a fixed place, where it is ſettled, and from whence it cannot be removed; but to natural perſons the name of the place is but an addition; for they may remove and change place, and ſo their names would have perpetual alterations.

* Page 229. Poph. 57. * *Popham* compares the name of a place of a corporation to the ſurname of a perſon, which regularly ought to be expreſſed in leaſes; but if it be not put with all exactneſs, yet it avoids not the leaſe; but however that be, it is certain the miſtake of the very name of the place, which doth not miſname the ſituation, is not material; for then it keeps within the general rule formerly given.

Ibid. Id. Britton and Wrightman. As if a corporation be founded by the name of the dean and chapter of the collegiate church in *Oxford*, and they make a leaſe by the name of the dean and chapter of the collegiate church in the univerſity of *Oxford*, this is well enough; for the place of the ſituation is well and ſufficiently ſhewn.

1 And. 196. But if a corporation be incorporated by the name of the guardian and ſcholars of *Merton* in the

the univerſity of *Oxford*, and they make a leaſe by the name of the guardian and ſcholars of *Merton* in *Oxford*, it is not good; for the place of the ſituation is not well alledged; for if the general word *Oxford* contained town and univerſity of *Oxford*, it is in *Oxford*, and ſo the leaſe anſwers the name; but if the college is named to be within the univerſity of *Oxford*, the ſaying generally it is in *Oxford* is not * ſufficient, becauſe it doth not appear within the precincts of the univerſity. 10 Co. 125. *cont.* * Page 230.

If a corporation be founded by the names of *decanus & capitulum cathedralis ſanctæ & individuæ trinitatis Carlienſis, ſanctæ trin' in Carliſtia & totum capitulum de eccleſia præd'*, this is good, though *in Carliſtia*, for *Carlienſis*, and *individuæ* be omitted. 10 Co. 124.

If a corporation be founded by the name of the dean and chapter of the king's free chapel of *St. George the martyr* within the caſtle of *Windſor*, and the leaſe is made by the name of the dean and chapter, and within the caſtle of *Windſor*, this is well enough. 10 Co. 124.

But to erect an hoſpital by the name of the hoſpital in the county of *S.* or in the biſhoprick of *B.* it is not good; for the place is too large and uncertain; for it doth not diſtinguiſh its ſituation; and if one corporation may be erected, then a ſecond may; which would cauſe an uncertainty and utter confuſion in the names; but a college erected *in academia Cambridge* or *Oxford*, is well enough, becauſe thoſe are particular places, and the corporation muſt be there ſufficiently known. Poph. 57.

Fifthly, The name of the ſaint; and if this be omitted or miſtaken, this doth not avoid their grants or leaſes; for the name * of dedication is but an empty ſound, and expreſſes no real uſe or deſign; and therefore is immaterial, and may be omitted. * Page 231.

If the prior of *St. Michael* of *Coventry* makes a leaſe by the name of our dean of *Coventry* this is good; 11 Co. 21. Poph. 59. 10 Co. 124.

good; ſo if they granted an annuity or corrody, and the name of the ſaint had been omitted.

If a corporation be inſtituted in honour of *St. George the martyr*, and in the leaſe they omitted the word *martyr*, it is well enough.

Hob. 33. 19 H. 8. 8. If a deviſe be to the abbot of *St. Peter* where it is really the abbot of *St. Paul*, the deviſe is void; for here the ſaint's name is the only ſpecification of the party in the deviſe, which is miſtaken.

The names of corporations are to be conſidered in declarations and pleadings.

10 Rep. 126. Hardr. 504. *Firſt*, If the corporation have ſeveral names.

Secondly, If the name be miſtaken.

Thirdly, If he put the right name firſt, and varied from.

Firſt, If the corporation have ſeveral names, there is a difference between an ancient corporation, and a corporation newly erected; for an ancient corporation by uſe may have ſeveral names differing in ſubſtance; but otherwiſe of a corporation within memory; for this regularly can only have the name by which it is conſtituted.

* Page 232. Chancellor of Oxford's Caſe. * But any corporation by act of parliament may take by another name, than that by which it was inſtituted; for in acts of parliament the ſubject and deſign of the legiſlature muſt be reſpected; and thoſe, that have power wholly to change the name of things, have certainly power to alter it in any act of theirs; and all inferior juriſdictions are bound to ſupport the ſenſe of the law, and not to deſtroy it, if it hath any meaning; and therefore the ſtatute that advowſons of popiſh recuſants convict be given to the chancellor and ſcholars of the univerſity of *Oxford*, and they bring their action by the name of the chancellor, maſters, and ſcholars of the univerſity of *Oxford*, this is well enough.

Hil. 8 Gul' Regis; College of Phyſicians v. Salmon. 5 Mod. 327. 2 Salk. 45. The college of phyſicians were incorporated by the name of the preſident and college, or commonalty of the faculty of phyſick; and afterwards

wards in the patent it was granted, that the preſident of the college ſhould ſue and be ſued in behalf of the college, brought an action againſt doctor *Salmon*, upon the ſtatute for practiſing without licence under the ſeal of the college; and it was controverted, whether it ſhould be brought by the name of the preſident and college, or by the name of the preſident; and the court allowed to ſue by either, and ſo were the precedents; for tho' * it was a rare inſtance, that the corporation ſhould be incorporated by one name, and have leave to ſue by another name; yet where it is ſo, it is very natural and proper as well as by the original name; for by this they are inſtituted as a body politick; as by the name that they have an expreſs power of ſuing by.

* Page 233.

Secondly. If it be wholly miſtaken; it is to be known, that ſome have held, that when a politick perſon is impleaded, to name him by the name of his politick capacity, is ſufficient, and that this will ſerve inſtead of chriſtian and ſurname, becauſe he is not to be diſtinguiſhed from natural perſons, ſince as a natural perſon he is not impleaded; but it is enough to diſtinguiſh him from all other corporations.

2 Inſt. 666. Yelv. 34. 49. 50.

Others have taken this difference: where there is a ſole corporation, the chriſtian name ought to be laid in the declaration; as where a fee-ſimple is lodged in one perſon, as *John*, biſhop of *Canterbury*, *Thomas* abbot of *D.*

2 Inſt. 666.

But where the corporation is aggregate of many capable perſons, as mayor and commonalty, dean, and chapter, *&c.* none of them in pleading are named by their proper chriſtian and ſurname.

And the reaſon was before hinted at, becauſe in the firſt caſe the death of the individual * is a good plea in abatement; for a new ſucceſſor comes in his place, that was not party to the former writ.

* Page 234.

But

27 H. 6. 3. But bodies aggregate are immortal and invariable, and therefore the parties to the firſt writ are always the ſame; but all are agreed, that if a corporation be impleaded, that the name of the body politick comes inſtead of the ſurname; for that is not neceſſary to diſtinguiſh him as an individual, or as a corporation, and there a writ brought by or againſt the biſhop of *Canterbury*, omitting the ſurname, is good.

10 Co. 126. Co. ib. 65. *Secondly*, There is a difference between writs, declarations, *&c.* and obligations, and leaſes; for that if the name of a corporation be miſtaken in a writ, a new writ may be purchaſed of common right; but it were fatal, if miſtaken in leaſes and obligations, and the benefits of them would be wholly loſt; and therefore one ought to be ſupported, and not the other. *John*, abbot of *W.* granted common of paſture to *J. S.* by the name of *William*, abbot of *W.* this is good enough *cauſa qua ſupra*.

6 Co. 65. But if this name had been thus miſtaken in a writ, it had been fatal.

Ibid. A corporation was inſtituted by the name of *præfecti & guardianorum naupegorum de Rederiffe*; and an action is brought againſt * them by the name of *præfecti, guardiani & ſocii*, and accounted bad.

2 Bulſt. 233. Tipling and Pexall. * Page 235.

So if a writ be brought by *Hugh*, prior of *Coventry*, this is too general and ſhall abate, but, in a leaſe ſo made, had been good.

Cro. Car. 574. Healing and Mayor of London. If the corporation be named by their name, and afterwards miſtaken; as if judgment be given in an action of debt, that the mayor or commonalty, and citizens, ſhould recover the debt, and 6*d.* coſts *eiſd' major' & communitat'*, omitting *civibus*, this was allowed error.

Of the ſtate, place of abode, and dignity, or ſome *periphraſis* or circumlocution, by way of neceſſary inducement.

Firſt,

Firſt, As to the ſtate, place of abode, and dignity.

State is defined by the *civilians*, the capacity of moral perſons; for as natural perſons have a certain ſpace in which their natural exiſtence is pleaded, and in which they perform their natural actions; ſo have perſons in a community a certain ſtate or capacity in which they are ſuppoſed to exiſt, to perform their moral acts, and execute all civil relations.

How far it is neceſſary to take notice of the ſtate and dignity, and place of abode, is here conſidered.

Firſt, in judiciary forms.

* *Secondly*, In contracts. * Page 236.

Firſt, In judiciary forms; and here firſt it is to be diſtinguiſhed between names of dignity and names of worſhip, that we ſee what was the common law in theſe caſes; names of dignity are marks of diſtinction impoſed by publick authority, and they always make the very name of the perſon to whom they are given: and they are of two ſorts, either of ſuch marks of diſtinction as exclude the ſurname, ſo that the perſons may not ſeem to be of any common family, and ſuch are the names of earls, dukes, *&c.* that exclude their ſurnames, and by them the parties muſt plead and be impleaded; otherwiſe the writ abates. 2 Inſt. 666. Theol. 35. 7 H. 6. 29. Fitz. Br. 198, 258, 259, 480. Show. 89.

Secondly, They are ſuch marks of diſtinction as are always impoſed by the ſupreme power, and are parcel of the name itſelf, but do not exclude the ſurname; ſuch as knight, baronet, banneret, *&c.* ſince theſe are impoſed by publick authority, in declarations and pleadings they could not be omitted; ſo that if the *capias* be awarded againſt *J. S.* knight, where he is a baronet, it is void; for they are not of the ſame name, and therefore ſhall not be intended the ſame perſons. Hale *ſuper* Lit. 3. 6 E. 4. 19. 7 H. 4. 7. Theol. 50. Show. 392. Dy. 88.

But names of worſhip, ſuch as eſquire, gentlemen, and yeomen, ſince they are only * names of diſtinction 2 Inſt. 666. * Page 237.

diſtinction in popular uſe, not given by the publick authority of the ſupreme power, the law does not account them parcel of the name, and ſo they were not neceſſary at common law in declarations and pleadings.

3 E. 1. 1 Theol.

Hale 89. 92.

The ſecond ſort of additions are of inducive *periphraſis*, or deſcription, and there are two ſignal inducements to a great many actions.

Firſt, As heir, *Secondly*, as executor or adminiſtrator.

Firſt, Heir; and here it is to be conſidered,

Firſt, Where the inducement is miſtaken.

Secondly, Where it is varied from.

Firſt, Where miſtaken; and here the diverſity is, where the inducement is neceſſary, and miſtaken, it is fatal to the action; otherwiſe, where the inducement is not neceſſary, but ſurpluſage only: as if an action of detinue of charters be brought againſt J. C. and the writ is *præcipe* J. C. *fil' & hæred'* of *R. C.* and he counts of a bailment to the defendant himſelf, the defendant pleads, that he was ſon and heir to *W. C.* and not to *R. C.* this is no good plea, becauſe he was charged with an injury done by himſelf; but if he had been charged upon any covenant of his anceſtor, as his repreſentative, there the * *periphraſis* muſt have been rightly formed; for otherwiſe the plaintiff doth not intitle himſelf to his action, and there this had been a good plea.

10 Ed. 4. 12.

* Page 238.

Cro. El. 333. Anneſley and Stokes. Hale *ſuper* Lit. 3. Poſſ. 25. El. 242. Woodeygate and Audley.

Secondly, Where it is varied, this is fatal; as if the writ be againſt the ſon and heir apparent, and the declaration againſt the ſon and heir generally, this is not good, and for ſuch an error judgment may be reverſed; ſo a declaration againſt heir, and judgment againſt ſon and heir apparent, ſhall be reverſed.

1 Saund. 111. Dean, &c. v. Guiſe.

Secondly, Executor; and it is to be known that if this inducement be not at firſt in a declaration, yet if it afterwards appears that the party is charged as executor, this is ſufficient; as if an action of

covenant

covenant be brought againſt *J. S.* executor, and be not named at firſt *J. S.* executor of the laſt will and teſtament, but afterwards it is ſhewn that the teſtator did covenant and bind himſelf, his executors, &c. and made *J. S.* his executor, and died, and aſſigns a breach, this is ſufficient without a formal nomination. In debt brought againſt *B.* executor of the will of *C.* the defendant pleads that *C.* made *A.* his executor, and died, and demands judgment of the writ; the plaintiff replies, that *A.* before any probate of the will died, and that the defendant proved the will, and the writ was * abated, becauſe ſince the executor in this caſe is reſiduary legatee, and died before probate, the executorſhip of his goods ſhall be committed to his executor as adminiſtrator of the firſt teſtator *cum teſtamento annexo*; and therefore he ought not to be charged as executor but as adminiſtrator *de bonis non* of the firſt teſtator.

* Page 239.

If *A.* makes *B.* his executor, and dies, *B.* proves the will and makes *C.* an infant executor, and dies, adminiſtration *durante minor' ætat'* generally committed to *D. D.* ſhall not be charged as adminiſtrator *duran' minor' ætat'*, as to the affairs of the firſt teſtator; but if the firſt executor be reſiduary legatee, *D.* ſhall be charged as adminiſtrator *de bonis non* of the firſt teſtator.

Vide Hob. 346. Norton v. Mulenuex & Ford, he may be charged as Adminiſtrator of the firſt Executor in a Covenant of the firſt Teſtator.

But if the executor be not reſiduary legatee, and dies *inteſtate*, adminiſtration *de bonis non* is to be committed to the next of kin to the firſt teſtator.

Cro. El. 211.

Secondly, What new laws are introduced by the ſtatute of additions in the time of *H.* 5. it was perceived that the chriſtian and ſurname were not ſufficient determinations of perſons, and did not ſufficiently avoid the confuſion that might happen by the miſtake of perſons; and an innocent perſon might upon proceſs of excommunication be diſtrained, upon having the ſame name with the real defendant; and by 1 *H.* 5. it was * enacted, that in all perſonal actions, appeals, and indictments, there

* Page 240.

2 Inſt 665.

there ſhould be added to the name of the defendant their eſtates, degrees, myſtery, and place of abode; and ſo by this law the name of worſhip was made equally neceſſary in theſe actions, as the name of dignity was before.

Firſt, It is to be known, that the firſt doth not extend to the names of the plaintiff, for they were in no miſchief or danger to be miſtaken.

Cro. El. 312. The plaintiff in the obligation was named *J. Thornaigh* of *Fenton in com' Norfolk armig'*, and in debt he declares by the name of *J. Thornaigh armig'* only; this is well enough, being on the part of the plaintiff; but otherwiſe had it been on the part of the defendant.

At common law, upon the demiſe of the king, all ſuits depending in the king's courts were diſcontinued, ſo that the plaintiffs were obliged to commence new actions or to have reſummons or reattachment, and the former proceſs to bring the defendant in; to prevent the expence as well as the delay on theſe occaſions, it is enacted 1 *E.* 6. *c.* 7. that all ſuits pending between party and party, ſhall not on the demiſe of the king be diſcontinued, but that they ſhall ſtand good and effectual, the death of the king notwithſtanding; but in all caſes * when the king is only party, or when the information is *tam pro domino rege quam pro ſe ipſo*, and the king dies before the judgment, all the proceedings on the information are loſt; becauſe that king who was party is dead; but the information or indictment ſhall ſtand; for as there are ſeveral penal ſtatutes which are to be proſecuted within a limited time, which would be loſt if the information which was brought in due time was abated, the law will not permit that the act of God ſhould protect thoſe from being puniſhed, who had broken the laws, *pro bono publico*.

Cro Jac. 14. 7 Co. 30, 31. Moor. 748.

* Page 241.

Thus ſtood the law until 7 *Annæ*, *c.* 8. which enacts, that no writ, plea, proceſs, or any proceeding on any indictments or information, or any offence,

offence, or any writ or process, or any debt or account to the king concerning lands, tenements, or other revenue, shall be discontinued by the demise of the queen, or her successors.

That no commission of assize, *Oyer* and *Terminer*, general gaol delivery, in association, writ of admittance, writ of *si non omnes*, writ of assistance or commission of the peace, shall be determined after any demise, for six months, unless superseded.

That no original writ, writ of *nisi prius*, commission, process, or proceeding in any * court of equity, nor any process on any office, or inquisition, nor *certiorari*, nor *habeas corpus*, either civil or criminal, nor attachment, process for contempt, nor any delegacy, or review for any matters ecclesiastical, testamentary, or maritime process, shall be abated by demise. * Page 242.

The act extends to *Ireland*, *Jersey*, and *Guernsey*, and to all his majesty's dominions in *America* and elsewhere.

An abatement by the death of parties.

THE rule is, *That wherever the death of any party happens pending the writ, and yet the plea is in the same condition as if such party were living, there such death makes no alteration*; for where the death of the parties makes no change of proceeding, it would be unreasonable that the surviving parties should make any alteration in their writ; for if such writ and process were changed, it would lett rights, which were in the same condition they were at the death of the parties; and it would be absurd that what made no alteration, should change the writ and the process; and on this rule, all the diversities turn.

* The first difference is in real actions; where there are several pleadings, there is summons and severance, * Page 243. 1 Inst. 139.

ſeverance, as there is in moſt real actions, there the death of one of the parties abates the ſuit; but in perſonal and mixed actions, where one intire thing is to be recovered, there the death of the parties does not abate the writ; and the reaſon of the difference is, where there are two jointenants, and the one goes on to recover his moiety, and the other will not proceed, there is no reaſon, that he who is willing to proceed, ſhould not recover his right, ſince ſuch tenant has a diſtinct moiety, and therefore ſhould have an action to recover it: but no ſummons and ſeverance lies in perſonal actions; as, if trefpaſs be committed in ſuch joint-tenants, they muſt both join in the action, for as one may releaſe the whole, ſo the other may refuſe to go on, and the other cannot recover his part of the damage without him; ſo in debt by an obligation to two, there can be no ſummons and ſeverance, becauſe one of the joint obligees may releaſe the bond, and therefore may not go on in the action; but if a man appoints two men executors, there ſhall be ſummons and ſeverance, becauſe tho' one of the executors may releaſe ſuch a releaſe is a *devaſtavit* in him; but if he will not proceed at law,

* Page 244. * it is no *devaſtavit*; and therefore both executors being only truſtees for the perſon deceaſed, they ſhall not both be compelled to go on together; but if one refuſes, the other may bring his action in the name of both, and have ſummons and ſeverance; for otherwiſe each co-executor might, by colluſion with the debtor and not proceeding, keep the other from recovering the aſſets, and yet not create a *devaſtavit* in himſelf; but after ſuch ſummons and ſeverance he does not proceed for the moiety, as in the real actions; but he proceeds in that action as the whole repreſentative of the teſtator, and is intitled to the whole the teſtator was in his life-time.

Co. Lit. 139. From theſe premiſſes it follows, that if there be two jointenants or copartners, and they bring a real

real action, and one is ſummoned and ſevered, the other ſhall proceed for his moiety; and if the perſon ſevered dies, the writ abates, becauſe he goes for the whole, in caſe of the death of the jointenant, or of the copartner without iſſue; and it would be improper to do it on that writ, whereby the ſummons and ſeverance went only for a moiety before, and the writ cannot have a double effect to go on for a moiety in caſe of ſummons and ſeverance, and for the whole in caſe of ſurvivorſhip; and therefore ſince the ſtate of * the things is changed by the death of one of the parties, there muſt be a new writ; and it is the ſame law, if ſuch jointenants ſhould proceed without ſummons or ſeverance, for ſince both by the writ might by poſſibility recover their moiety, they ſhall not go on for the whole in caſe of ſurvivorſhip, becauſe the words and effects of the writ at the time of its firſt purchaſing, was that each might recover his moiety; and therefore a new writ muſt be purchaſed to enable one to proceed for the whole. * Page 245.

But in perſonal and mixed actions, where there is ſummons and ſeverance, the plaintiff goes on for the whole; there if one of them dies, yet the writ ſhall not abate, becauſe they go on for the whole after ſummons and ſeverance; and if they were to have a writ, it would only give the court authority to go on for the whole.

If an action be brought in an inferior court againſt a *feme ſole*, and pending the ſuit intermarries, and afterwards removes the cauſe by *habeas corpus*, and the plaintiff declares againſt her as a *feme ſole*, ſhe may plead coverture at the time of the ſuing the *habeas corpus*, becauſe the proceedings are here *de novo*, and the court takes no notice of what was precedent to the *habeas corpus*; but upon motion on the return of the *habeas corpus* the court * will grant a *procedendo*; for though this be a writ of right, yet where it is to abate a rightful ſuit the court may refuſe it, and the bail be- 1 Salk. 8. * Page 246.

low, to this ſuit, which by this contrivance he is ouſted of, and poſſibly by the ſame means of the debt.

1 H. 4. 1. 2 H. 4. 7. Theol. 10. Bro. Baron & Feme 66. Co. Lit. 133. There is one caſe, where the *feme covert* ſhall ſue and be ſued as a *feme ſole*, (*viz.*) where the huſband has abjured the realm, or is baniſhed; for then he is *civiliter mortuus*, and the huſband being diſabled to ſue for the wife, it would be unreaſonable that ſhe ſhould be remedileſs.

And it would be equally on thoſe, who had any demands on her, that not being able to have any redreſs from the huſband, they ſhould not have any againſt her.

Idem. It ſeems likewiſe, that a *feme covert*, if ſhe is a farmer to the king, may likewiſe ſue without her huſband, it being to preſerve the publick treaſure.

Co. Lit. 133. But theſe caſes of coverture are not to be extended to the queen; for ſhe is of that dignity in law, that ſhe may ſue in her own name; for ſhe has a † ſeparate property diſtinct from the king her huſband, and the ſubject may have remedy againſt her without applying to the king; for he being employed about the *ardua regni* is not to be interrupted by any thing, that does not immediately relate to himſelf.

2 H. 6. 4. Dr. pl'it. 3. * Page 247. * The next thing to be conſidered, is when the writ is abated *de facto*, and where it is only abateable, and here the general rule is, when the writ *de facto* abated; as if an action be brought againſt a *feme covert* as ſole, this makes another man's property liable, without giving him an opportunity of defending himſelf, which would be contrary to common juſtice; therefore the writ is *de facto* abated.

42 H. 6. 4. Dr. pl'it. 3. But when the writ is abateable, it ſhould be abated by pleading in time, or the writ ſtands good; thus coverture after the writ purchaſed muſt

† The *aurum regina* is what is here alluded to.

muſt be pleaded *poſt ult' continuationem*: for the huſband is attached with the action, and therefore muſt plead in time; as the wife cannot by her own act deſtroy another man's action, nor the huſband, unleſs he comes in time, for the action was well commenced.

Thus, if a writ be brought to the damage of 40*l.* and declares *ad damn'* 200*l.* the verdict gives 30*l.* this is no error after verdict; for the writ is not abated *de facto*, but only abateable. Palm. 270, 271.

Let us now conſider what abates the writ *in toto*, and what in part only.

And the general rule is, *that whatever proves the writ falſe at the time of ſuing it out ſhall abate the writ intirely*; as if it appears * on the plaintiff's own ſhewing, that he has no cauſe of action for part. Dr. pl'it, 4. 22. E. 4. Hob. 195, 217, 242, 279. * Page 248.

Thus, if an action of treſpaſs be brought againſt two defendants, and the one plead that the other was dead *Die impetrationis brevis*, or that there is none ſuch *in rerum natura*, the whole writ ſhall abate; for it is the plaintiff's fault to abuſe the authority of the court to call in a man that was dead; and it was no leſs an abuſe of the proceſs to iſſue it againſt a feigned perſon. 1 Bulſt. 1.

But if one of the defendants die, pending the writ, this ſhall not abate the action againſt the other defendant; for this is the act of God, *&c.* and no fault in the plaintiff; but this falſification of the writ muſt be in a material point; for in a *præcipe quod reddat* againſt two, if one pleads *non-tenure*, and the other takes the whole tenancy on himſelf, the writ ſhall not abate in the whole, but ſtand good againſt him that has accepted the tenancy, becauſe he is a proper defendant to the action, and the *non-tenure* of the one does no way prejudice the other defendant. 22 E. 4. 4. Raſt. Ent. 365. Dr. plit'.

But if there be two executors, and one is named of *D.* and ſays he is of *C.* the writ ſhall abate againſt both, becauſe they are both the repreſentatives Dr. pl'it' 7. 21 H. 6. 4.

tatives of one perſon, and muſt both be legally ſummoned; as they are both but one perſon in
* Page 249. the eye of the * law, the plaintiff cannot proceed againſt the one without the other; but in this caſe, the other defendant will be obliged to plead, though the defendant's plea in abatement ſhall be firſt determined; and if it be found for him, ſhall abate the writ *in toto*.

Co. Lit. 362, 363. Antiently in real actions, there were no damages given where nothing but the freehold was in
3 Lev. 330, 331. queſtion; and if the tenant pleaded *non-tenure* and diſclaimer, the plaintiff could not aver his writ, and ſay he was tenant; for by this plea the tenant diſclaims all right to the land, ſo that he can never put up any pretenſions or demands precedent to his diſclaimer, and the demandant is immediately put into poſſeſſion of his lands, which was the only intent of his writ, *& fruſtra fit per plura quod fieri poteſt per pauciora.*

But where damages were to be recovered, *non-tenure* with diſclaimer was no plea, for he might in-
3 Lev. 330, 331. jure the demandant, ſhould he be arreſted of his damages which the law gives him.

Ibid. But where the *non-tenure* was without diſclaimer, the plaintiff could either aver his writ, or take judgment at his election, for if the demandant would take upon him, that the tenant be tenant to the freehold, he might put it in judgment upon
* Page 250. that * writ, and the entry is *ſuo periculo habeat inde executionem.*

At common law *non-tenure* of parcel abated the whole writ, for this falſified the writ, which alledged the defendant to be tenant to the whole.

But it was thought very hard that a writ, which was good in part, ſhould be totally deſtroyed by this plea; and therefore 25 *E* 3, 16. the writ was abated only for that part of which *non-tenure* is alledged.

Booth 29.
36 H. 6, 7.
4 E. 3, 497.
8 E. 4. 6. But at common law, when *non-tenure* of parcel was pleaded, the tenant was to ſhew who was te-

nant,

nant, for they would not suffer a writ that was good in part to be wholly destroyed, except the tenant shewed the demandant how he might have a better writ.

But where *non-tenure* of the whole lands is pleaded, the tenant's plea will be good, without shewing who is tenant, for he is brought into court to answer a demand which he seems to be no way privy to, but utterly disclaims. 1 Mod. 191.

From this statute arose the distinctions in our books; but though a plaintiff cannot destroy, yet he may abridge his demand.

For since the defendant's pleading *non-tenure* as to parcel was not to abate the whole writ, but to stand *quoad* the other part; therefore if the plaintiff had entered * into part, and the defendant had pleaded this entry to abate the whole writ, it would not have been a good plea, for it amounted to no more than that which the defendant remained a tenant to; and when the plea was over-ruled it was of necessary consequence that the demandant ought to abridge; for since the demandant could go on with the remainder of his writ, after such plea he may go on as originally. * Page 251.

Thus in *formedon* in the remainder for the manor of *Dale*, if the demandant enters into any part of it, he revests the whole freehold in himself, and consequently the tenant may plead a *non-tenure* in the whole, which abates the writ since, as well as before the statute. 4 E. 4. 32. 2 H. 7. 16. Doct. pl'it. 5.

But if the *formedon* be for twenty acres, and the demandant enters into six, this is but an abridgment of his demand, and is no more than *non-tenure* of six acres, so that the writ stands good; and formerly they made this distinction, that if a demandant brings a writ for two several manors in two several *Vills*, and entered into one, this abated the whole writ; for they were looked upon as two several demands, and the destroying one entire demand was a destruction of the whole writ, being Doct. pl'it. 5 H. 7. 8. Theol. 76. 140.

not

not helped by the statute, but left as if it was at common law.

* Page 252. * But if the demand was for two manors in the same *Vill*, they looked upon them both to be but one demand, being both but parcel of the same place of which the *vill* was the total; and therefore the defendant could not plead the entry into one of the manors in abatement of the whole writ, so the plaintiff might abridge his demand *quoad* one of the manors, and proceed for that only.

Doct. pl'it. 5. Theol. 76. But the better opinion seems to be, that though the manors be in two several *Vills*, yet the plaintiff by entering into one does not abate the writ, because they took the demand of the writ as the total, and the several demands of the writ, not as so many independent demands in the writ, and then the entry into one created a *non-tenure* of parcel, which was no good plea; and therefore the plaintiff might well abridge his writ.

Hence it is, that this abridgment does not extend to personal demands; for this statute, from whence the constitution arose, extends only to real actions, and not to personal; therefore if in debt the defendant pleads that, since the purchasing the writ, the plaintiff has received part of the debt, the whole writ shall abate, because it appears the whole money is not due, as by * the writ is demanded, which he had already begun in a court of justice.

* Page 253.

Doct. pl'it. 6. 3 Cro. 253. But if issue be taken on it, it is helped after verdict, by the statute. 3 Cro. 266. 3 Saund. 182. Style 173. But if a debt be brought on an obligation to deliver twenty quarters of barley, it is no plea to say, that *pendente pl'ito* the plaintiff had received fifteen quarters, for the delivery of the corn is collateral to the bond, the conditions not being fulfilled, the penalty is still in force.

The earl of *Dappa* and *Mayo*, the plaintiff declared for arrears of a rent-charge, and demanded a larger sum than was due to him upon his own shewing, by 7*l.* 10*s.* the defendant pleaded a bad

plea,

plea, and the plaintiff had judgment for his whole demand; but, perceiving his mistake on the entry of the judgment, he releases the 7*l.* 10*s.* and it seems to be a good release, and that it was not a falsification of his writ, but rather an affirmance; but in the argument of that case, if the defendant had taken advantage of it in due time, it would have abated the writ.

So if the demandant enters into any of the lands, pending the writ, he shall abate the writ *in toto*. Doct. pl'it. 5. 4 E. 4. 32. Cro. El. 35, 143. Moor 466.

When the defendant pleads a matter which gives the plaintiff a better writ, he shall abate the other; as if trespass be brought by one tenant, the defendant may plead that he was tenant in common with a * stranger; for this falsifies the plaintiff's demand, and shews that he has no right to the action he has commenced. Doct. pl'it 6. Otherwise if it be found by jury. * Page 254.

If there be two or more plaintiffs, a disability in one of them shall stop the others proceedings on their writ; for as they have made it a joint demand, the defendant, by disabling one of them, shews the others have no right to proceed, for they cannot all recover, and the writ has supposed them all to have an equal right. So if it be found by verdict. 8 Co. 143.

When the writ doth abate by the plea of one for want of form, it is abateable *quoad* the rest, although they have pleaded to issue. 8 Co. 159.

If a man pleads a joint tenancy, or several tenancies, or sole tenancy, this is a good plea in abatement; for though the freehold is acknowledged to be in the defendant, yet if he has not the freehold in the same manner as he is supposed to have it by the writ, it is a good plea to the writ, and the reason is, because he cannot dereign his title to the freehold in any other manner than as he then holds it; and therefore if the plaintiff doth not implead him in the manner he then holds it, the plaintiff used to purchase a new writ, which brought no great hardship in the old times when

when the infeudations were publick, and every
* Page 255. one either * knew or might know how the feudal tenant held.

Booth 32, 33, &c. Lut. 11, 12. Hence it is, that in ſuch pleas the tenant muſt either ſhew a title, or vouch over as well as plead to the writ, becauſe the defendant does not ſhew the neceſſity he has to uſe ſuch plea unleſs he pleads over, and he ſhall not only anſwer the demands of the plaintiff to begin again his demand to lands which the defendant owns he holds, unleſs the defendant ſhews that he could not come to his title but in the manner ſet forth in his plea.

9 H. 6. 12. Doct. pl'it. 10, 11. The next thing to be conſidered of is when a writ is abated by matter of record, and here the general rule is, *that whenever it appears on the record, that the plaintiff has ſued out two writs againſt the ſame defendant for the ſame thing, the firſt not being determined, the ſecond writ ſhall abate*; for the law abhors multiplicity of actions, and will not allow that a man ſhall be twice arreſted, or twice attached by his goods for the ſame thing; for if ſo, he might ſuffer *in infinitum*.

And it is not neceſſary that both writs ſhould be pending at the time of the defendant's pleading
* Page 256. in abatement; for if there * was a writ in being at the time of ſuing out the ſecond, it is plain the ſecond was vexatious and ill *ab initio*; and therefore could not be rectified by a ſubſequent determination of the firſt.

4 H. 6. 24. Doct. pl'it. 10. But then it muſt appear plainly to be for the ſame thing, for an aſſize of lands in one county ſhall not abate an aſſize in another county, for theſe cannot be the ſame lands.

3 H. 7. 3, 4. Doct. pl'it. 10. But a *formedon* in rent may be pleaded in abatement of a *formedon* of the ſame manor whence the rent iſſues, *& vice verſa*, becauſe the plaintiff cannot have a manor and the rent iſſuing out of it; and therefore the ſecond *formedon* is apparently vexatious.

Doct. pl'it. 12. In general writs, as covenants, detinue, and aſſize, where the ſpecial matter is not alledged,

and

and the plaintiff is *nonſuited* before he counts, though the ſecond writ was ſued pending the other, yet the *formedon* ſhall be pleaded in abatement, becauſe it does not appear to the court that it was for the ſame thing, for the firſt writ being general, the plaintiff might have declared for a different thing from what he demands by the ſecond writ.

But when the firſt writ is a ſpecial writ, and ſets forth the particular demand; as in a *præcipe quod reddat, &c.* there the court * can readily ſee that it is for the ſame thing; and therefore the plaintiff ſhall be nonſuited before he counts, yet the firſt ſhall abate the ſecond writ, it being apparently brought for the ſame thing. *Eodem.* * Page 257.

The law is ſo watchful againſt all vexatious ſuits, that it will neither ſuffer two actions of the ſame nature to be pending for the ſame demand, nor even two actions of different nature.

Therefore it is a good plea in treſpaſs, that the plaintiff has brought replevin for the ſame thing, becauſe in both caſes damages are to be given for the caption. 8 *V.* 6. 27. Doct. pl'it. 10.

But then there muſt not be more defendants in treſpaſs than in *replevin*, or elſe it cannot ſquare with the averment that it is *una eademq ; captio.* *Eodem.*

So in aſſize of *darrein preſentment*, a *quare impedit* depending for the ſame preſentation is a good plea. Hob. 184.

In a *quare impedit* brought by the earl of *Bedford* againſt the biſhop of *Exeter & al'*, the defendant pleads the plaintiff had brought another *quare impedit* againſt the ſame biſhop for the ſame preſentation, which is ſtill depending and undetermined, with an averment that it was the ſame plaintiff, avoidance and diſturbance; the earl replies, that ſince his former writ purchaſed, the ſame church being ſtill void, he preſented *Henry Curtis* to the biſhop, who refuſed him, which is the diſturbance he now complains of, and traverſes that *Ibid.* 137. * Page 258.

it

it is the ſame diſturbance on which both actions were brought; the defendant demurs; and ruled, the writ ſhould abate, for though there muſt be a diſturbance naturally to maintain the action, yet the principal effect of the ſuit is to recover the preſentation; for the nature of a *quare impedit* is be final on nonſuit or diſcontinuance, which his would defeat; for by this rule the plaintiff might bring a new one without leaving the former ſuit.

And though in this caſe there was a new defendant, yet the writ abated, becauſe there were two *quare impedits* againſt the ſame man; and therefore a freſh defendant could no more enable him to bring a ſecond *quare impedit*, than a new diſturbance could.

Salk. 1. Nothing ſhall be pleaded in abatement of a ſecond *ſcire fac'* upon a judgment, that was pleadable in the action; for it would be unreaſonable he ſhould diſable the plaintiff from having execution, ſince he admitted him able to have judgment; all matters in and before the writ muſt be pleaded in abatement, for no advantage can be taken of it by error.

Show. 169.

* Page 259. * But otherwiſe it is where it is after the writ.

Bre. Faux Latin 48. 4 H. 6. 3. 4. 41 E. 3. 13. 14. There is a difference between original and judicial writs, that in the former matter of form abates them, as well as ſubſtance; *aliter* in the later; for if the ſubſtance be good, the want of form will be aided.

Salk. 6. In pleas of abatement which relate to the perſon, there is a neceſſity of laying a *venue*, for all ſuch pleas are to be tried where the action is laid.

Idem 220. Moor's Caſe 198. Q. Kel. 77. where reply after judgment on demurrer. Salk. 218. If the defendant demurs in abatement, the court will give a final judgment, becauſe there can be no demurrer in abatement; for if the matter of abatement be *debors*, it muſt be pleaded; if intrinſick, the court will take notice of it themſelves.

If the plaintiff demurs in bar to a plea in abatement, he diſcontinues the ſuit; becauſe he does not maintain the writ.

On

On a plea in abatement no advantage can be taken of the errors in the declaration, for nothing but the writ is then in queſtion; for nothing elſe is pleaded to.

When a writ is brought for two things, and it appears the plaintiff cannot have any other action for one of them, the writ ſhall ſtand, for the part which is good; but where it appears he can have another writ in another form for one, there the whole writ ſhall abate; when there can be no * better writ brought for that parcel, it ought to continue; but if another writ could be brought for the parcel, it is bad, and ought to abate *in toto.* Godfrey's Caſe. 11 Co. 45. 1 Saund. 285. * Page 260.

If a ſecond writ be brought *teſte* the ſame day, the former is abated; it ſhall be deemed to be ſued out after the abatement of the firſt. Allen 34.

The court will not allow two *quare impedits* to be brought for the ſame preſentation, (*viz.*) a ſecond by the defendant againſt the plaintiff, when there is one pending in court by the plaintiff againſt the defendant; *et ſic in breve de partitione*, becauſe the defendant can have the ſame remedy on the firſt writ as he could on the ſecond.

CHAP. XVIII.

Of Coſts.

THERE was no ſuch thing as coſts of ſuit at common law; but if the plaintiff did not prevail he was amerced *pro falſo clamore*; if he did prevail, then the defendant was *in miſericordia* for his unjuſt detention of the plaintiff's right; but this made the plaintiff no amends for the coſts that he had laid out of pocket in obtaining * his right; ſo it ſtood till the ſtatute of *Glouc. cap.* 1. but by that ſtatute, if any perſon recovered damages in a plea perſonal or mixed, he ſhould have his coſts, which was the original of coſts *de incremento*; for then damages were found by the jury; and it was thought Reeves v. Putler, Gil. R. 195. * Page 261. 2 Inſt. 288.

thought no diſhonour to the court, to tax the moderate fees of counſel and attornies that attend the cauſe; ſo matters ſtood for the plaintiff till 43 *El. cap.* 6. by which it was enacted, that if upon action perſonal to be brought in any of her majeſty's courts at *Weſtminſter*, not being for any title, nor intereſt of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it ſhould appear to the judges of the ſame court, and ſo ſignified or ſet down by the juſtices, before whom the ſame ſhall be tried, that the debt or damages to be recovered there in the ſame court, ſhall not amount to the ſum of 40*s.* or above; that in every ſuch caſe the judge and juſtices, before whom any ſuch action ſhall be purſued, ſhall not award for coſts to the party plaintiff any greater or more coſts than the ſum of the debt or damages ſo recovered ſhall amount unto, but leſs at their diſcretions. By this law no doubt they intended to bring back all perſonal actions into the courts baron, or county courts; but they did not effectually * do it; for as the law was worded it did not take away coſts *de incremento* from the courts of *Weſtminſter*, if the damages were under 40*s.* but they only gave a liberty to the judge, where damages were under 40*s.* to certify againſt the plaintiff having coſts, unleſs in caſe of battery, or where title of freehold or inheritance came in queſtion; but becauſe it was hard, that when a man had aſſerted his right, he ſhould pay coſts for it; and that if one injured another under the value of 40*s.* that he ſhould not be redreſſed in the King's Courts, they never uſed this power of certifying.

* Page 262.

Thus it ſtood till the ſtatute of 22 & 23 *Car.* 2. *cap.* 9. whereby it was enacted for making the law of queen *Elizabeth* more effectual, that in all actions of treſpaſs, aſſault and battery and other perſonal actions, wherein the judge at the trial of the cauſe ſhall not find and certify under his hand upon the back of the record, that an aſſault or battery

was

was ſufficiently proved by the plaintiff againſt the defendant, or that the title or freehold of the land mentioned in the plaintiff's declaration, was chiefly in queſtion; the plaintiffs in ſuch action, in caſe the jury ſhall find the damages to be under the value of 40*s.* ſhall not recover * or obtain more coſts of ſuit than the damages ſo found ſhall amount unto; and if any more coſts ſhall be awarded, the judgment ſhall be void. * Page 263.

This ſtatute likewiſe did not repeal the ſtatute of *Glouc'*; for a ſtatute cannot be repealed by implication; and therefore the judges conſtrued it, that the coſts *de incremento* ought ſtill to ariſe in all ſuch perſonal actions, where the judge's certificate was not neceſſary in order to the obtaining of coſts, and that was not only by the ſtatute in two caſes, where treſpaſs was done to the freehold, or to things fixed to the freehold, and the damages under 40*s.* and in battery, where the damages were under ſuch ſum.

Therefore, if the defendant juſtified by any thing that brought the title of the land in queſtion upon record, there the judge need not certify in order to intitle the plaintiff to his coſts; for it was not a caſe within the ſtatute. *Secondly*, If it was an action of trover, or treſpaſs *de bonis aſportatis* of goods and chattels not fixed to the freehold, it was out of the ſtatute, and no certificate neceſſary to intitle the plaintiff to his coſts; and therefore the plaintiff had coſts *de incremento* on the ſtatute of *Glouc'*. So *thirdly*, If an action of treſpaſs to the freehold, and an action of treſpaſs *de bonis* * *aſportatis*, were joined, and the plaintiff recovered in general upon both counts, he had no need of a certificate to obtain his coſts; and therefore coſts *de incremento* went upon the ſtatute of *Glouc'*.

1 Salk. 193. 2 Vent. 215. 2 Jones 288. Raym. 487. Smith v. Batterſon. 3 Mod. 39. Bamſ v. Edgard. Cumberbach 420. Cornet and Talboys. Mar. Rep. 1. Geo. 72. Lane v. Browne. * Page 264.

The ſtatute of 11 & 12 *W.* 3. *cap.* 9. maintains the ſtatute of king *Charles*, as extending only to the courts of *Weſtminſter*; but farther enacts, that it ſhall be extended to the principality of *Wales* and counties *Palatine*.

This

This construction of the Judges of the statute of King *Charles* seems to be very right from the 8 & 9 of *W.* 3. *cap.* 11. for the inconvenience was found, that the people did trespass upon their neighbours; yet not so as to the value of 40*s.* and so they could have no redress at the courts of *Westminster*, without losing their costs in such actions; and therefore by that statute a third manner of certificate was given, in these words; And for the preventing of wilful and malicious trespass, be it enacted, that in all actions of trespass to be commenced and prosecuted from and after 25 *March* 1697, in any of his Majesty's courts of record at *Westminster*, wherein at the trial of the cause it shall appear and be certified by the judge under his hand upon the back of the record, that the trespass upon which any defendant shall be found guilty,* was found wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit; any former law to the contrary notwithstanding.

* Page 265.

The intention of the statute of *Eliz.* was to reduce all actions, where the debt or damage was 40*s.* into the court baron, or other county courts, whereby they thought the profits of landlords would be encreased, and the costs of defendants diminished; but the statute failed of effecting that purpose, because they do not put it merely upon the damages given by the jury under 40*s.* for indeed that would have been hard, where the jury gave too little damages, to have punished the plaintiff with the loss of his costs; and therefore they put it, that the judge must certify the damages proved were not above 40*s.* in approbation of the verdict; but the judges thought it extreamely hard to certify in order to make plaintiffs lose the costs where they had prevailed, unless the action were exceedingly impertinent and vexatious.

Vide Danv. Tit. Costs.

There were no costs at common law given *ex professo* under that title; but the plaintiff was punished in amerciament to the king *pro falso clamore*, and

and the defendant *in miſericordia*, where the judgment was againſt him, and therefore was not puniſhed with the expence *litis* under that * title, * Page 266.
becauſe he would ſuffer twice for the ſame fault; but it ſeems in the *iters* where the expences of the ſuits began to encreaſe, they were wont to give their coſts in the groſs and unblended with the damages; and the Judges being in theſe *iters* aſſiſted with the officers of the court, 2 Inſt. 288, 289.
and not hurried or ſtrained in their ſittings, they could eaſily make a computation of ſuch coſts; but when *Ed.* 1. was changing his *iters*, and bringing in reſidentiary Juſtices to go the circuits and try the cauſes in their counties, that there might be the ſame uniform law; then it was neceſſary the coſts ſhould be taxed above, and not at the aſſizes; and thence by the ſtatute of *Glouc'*, the 6 of *Ed.* 1. they introduced coſts for the plaintiff, and the words are upon the aſſizes, writs of cozenage, *&c.* the demandant ſhall recover againſt the tenant the coſts of his writ purchaſed, together with the damages aforeſaid; and all this ſhall be holden in all cauſes, where a man recovers damages; this brought in coſts in real actions, where there were no damages, and alſo in all perſonal actions; for even in action of debt there are damages for the unjuſt detention; and upon demurrer the damages are confeſſed, and therefore there is a ſufficient authority for the court to aſſeſs the expence *litis*, or damage.

* From this law they began to make it a rule * Page 267.
for the better execution of the ſtatute, that the jury ſhould tax the damages apart, and the coſts apart, that ſo it might appear to the court that the coſts were not conſidered in the damages; and when it was evident, that the coſts taxed by the jury were too little to anſwer the coſts of the ſuit, the plaintiff prayed, that the officer might tax the coſts that were inſerted in the judgment; and

therefore said to be done *ex assensu* of the plaintiff, because at his prayer.

The statute of *Glouc'* is universal, that he shall recover in all cases where damages are recoverable, and from hence these propositions were formed.

First, That where damages were recoverable at the time of making the statute, there the plaintiff shall recover his costs which is by the plain meaning of the statute, which says, the plaintiff shall have costs wherever he has damages; but if there are several issues found for the plaintiff, or against the defendant, intire costs are given upon the whole charge the plaintiff was at.

Keil. 48. 10 Co. 117.

Secondly, Where there are damages before the making of this statute, and as a subsequent statute doubles or trebles these damages, * it likewise doubles or trebles the costs given by this statute.

* Page 268.

That statute, that doubles or trebles the damages, does double or treble the costs, because they are looked upon as part of the damages.

3 Inst. 362. 1 Rol. Ab. 784. 2 Inst. 289. Compleat Incumbent 230.

Thirdly, But where the statute gives either single, double, or treble damages subsequent to this law, and where there were no damages before, there no costs shall be allowed, because the party can have nothing more than such a new statute has already given, and that is damages only, and the statute of *Glouc'* cannot operate to add costs to what is given by a subsequent statute, because the new statute must be construed from itself, which gives damages only; and therefore for the court to give costs in such case, would be to go beyond the intention of the legislature in that statute.

Fourthly, Where a statute, (as in waste) which gives treble damages, the jury give single damages, which are afterwards trebled by the court; for it is the jury's part as matter of fact to ascertain the damages; and it is the business of the court to see the law executed, and consequently to treble them.

Fifthly,

Fifthly, There are no costs in abatement upon demurrer; because there are no * damages given, but only a *respondeas ouster* awarded. 1 Salk. 194. Thomas and Loyd. Garland and Exton.

N. B. The executor is within this statute, because damages are recovered against him; and therefore, when defendant, is to pay costs. * Page 269.

But the law has altered the statute of *Glouc.* in several particulars, to prevent frivolous and vexatious actions.

First, The statute of *Eliz.* did alter it in all personal actions, where debt and damages were to be recovered, and appointed that in such personal actions, where no more than 40*s.* is recovered, they should have no more costs than the sum recovered, unless the judge certified, that the trial concerned the title of the lands, or that a battery was proved; this statute was revived by 22 & 23 *Car.* 2. *c.* 9. 42 El. c. 6.

By 21 *Jac.* 16. that in actions for slanderous words, if the damages given are under 40*s.* there shall be no more costs than damages; but this extends only to words which affect the person, and not those which concern the title of lands. Cro. Car. 114. Ley. 81. Palm. 230, 231. 1 Jones 196.

The 22 & 23 *Car.* 2. *cap.* 9. gives no more costs than damages in action of trespass, assault and battery, and all other personal actions where there is not 40*s.* or more recovered, and if more costs, the judgment is *ipso facto* void.

* And this by 11 & 12 *W.* 3. *c.* 9. is extended to the principality of *Wales* and counties *palatine*. * Page 270.

But *note*, that the action being to be commenced in these courts, if they are commenced in the inferior, and removed by *habeas corpus* or *certiorari*, into the courts of *Westminster*, there the plaintiff shall have full costs.

By the statute of 8 & 9 *W.* 3. *c.* 10 in all actions of trespass where the judge certifies that the trespass was wilful and malicious, the plaintiff is to recover his full costs.

23 H. 8. 15. N. Bendl. 10. Keil. 207. Cro. El. 69. 503. Winch 10. 2 Danv. 234. 2. 16. 224.

But the words of the ſtatute are confined to wrongs done, or debt, or damages due to the plaintiff or plaintiffs; and therefore an executor or adminiſtrator is not within this ſtatute, and then the plaintiff pays no coſts; for the teſtator is as it were plaintiff by him, and he is not to recover to his own uſe, but is truſtee for the creditor.

Cro. El. 23. 1 Bulſt. 188.

The infant likewiſe commencing his ſuit by guardian, there can be no malice ſuppoſed in him.

2 Rol. Rep. 88. 1 Sid. 261. 2 Danv. 224.

There is a proviſion likewiſe in this act, that whoever ſues *in forma pauperis* ſhall not pay coſts, but ſuffer puniſhment at the diſcretion of the court; but if he be diſpaupered, the court gene-

* Page 271. rally order coſts to be taxed; and for non-payment he ſhall be whipped.

By 24 *H.* 8. *c* 8. the defendant ſhall recover no coſts on nonſuit, or verdict, where the plaintiff ſues to the king's uſe.

Cro. El. 217. Savil. 50. 1 Saund. 116.

But by the ſtatute of 18 *El. c.* 5. informers are to pay coſts, that is, when they are to receive the whole benefit; and this ſtatute being more general, *viz.* that the judgment be againſt him by judgment of law, it ſeems upon arreſt of judgment he ſhall pay coſts.

2 Lev. 116. Hutt. 35.

Hobb. 250.

The ſtatute of 4 *Jac. c.* 3. extends to all actions where a plaintiff is *nonſuit*, or a verdict paſſes againſt him, but extends not to infants or executors, being upon the model of 23 *H.* 8. *c.* 15.

The 8 & 9 *W.* 3. *c.* 11. gives coſts on all actions on demurrer to the defendant where the plaintiffs have coſts; and therefore they recover none in abatement ſince the plaintiffs have no coſts, as we have already ſaid.

The coſts on a *nonproſs* are given by the ſtatutes; and this is either before declaring, and then he is demandable; for he is not in court by attorney till he has declared; but ſince he has put in his appearance by attorney, the court will vacate his appearance,

appearance, if he does not do as he ought to do in declaring; and this ſort of *nonſuit* is as well within the ſtatutes, as when he is demandable at the *niſi prius*; but becauſe the *King's Bench* ſuffered them to be three terms without awarding *nonproſs*, therefore by 3 *Eliz. c.* 2. if it ſleep above three terms, it is enacted, that the defendant ſhall have his coſts and damages. ** Page 272.

After declaration put in by the plaintiff, and the defendant puts in a bar or a rejoinder and the plaintiff does not reply, there is judgment againſt him on the bar, *&c.* and coſts awarded, becauſe he does not proſecute his writ with effect.

But after iſſue joined, or a verdict given, the plaintiff cannot diſcontinue without leave of the court, which is never granted, but upon payment of coſts.

But if the defendant arreſts the plaintiff's judgment he has no coſts, unleſs againſt an informer, as is aforeſaid; for this is out of the words of the ſtatute, and they did not intend to favour executors in arreſt of judgment, where the defendant had obtained a verdict.

As there are ſeveral ſtatutes in relation to coſts in replevin, and error, we will here treat of coſts, particularly in theſe two actions.

Firſt, *Coſts in Replevin.* * Page 273.

IN Replevin the plaintiff had damages at common law, and coſts by the ſtatute of *Glouc.* as a conſequence of ſuch damage; but the avowant or defendant in *replevin* had no coſts; but the 7 *H.* 8. *c.* 14 gives damages and coſts, if the plaintiff be nonſuited, or have a verdict againſt him, or be otherwiſe barred; for every avowant, or perſon 2 Danv. 226.

person that makes conuzance, justifies as bailiff in *replevin* on second deliverance, for some rent, custom, or service: this not extending to damage feasant, the statute of the 21 *H.* 8 *c.* 19. extends to avowry, &c. for rents, customs, and services, &c. or for damages feasant, or for other rent or rents, so that a rent-charge is also within this statute.

Hard. 153. 2 Rol. Rep. 756. 3 Jones 424. 25, 436. Cro. Car. 432, 497.

But if the defendant by his justification claims property, as if he avows for relief, breach of a by-law, or *nomine pœnæ*, he cannot recover damages by this statute; but it seems he may have costs by 4 *Jac.* because the plaintiff recovers damages in this action.

Vide 17 *Car.* 2. for the more speedy and effectual proceeding upon distress and avowries for rent.

* Page 274.

* Secondly, *Costs in Error.*

AS there are no damages in this writ, but only a reversal or affirmance of the former judgment; so it was necessary to make a statute to redress the mischief that would arise from writs of error in order to delay execution; and therefore the 3 *H.* 7. *c.* 10. enacts, that whereas plaintiffs and demandants have been delayed from the execution of the judgment by writs of error, that if any defendant, or other person bound by the judgment, brought a writ of error in delay of execution, if the judgment be affirmed, or writ of error be discontinued, or the plaintiff in error be nonsuit by default of the party, the party against whom the writ of error is brought shall recover his costs and damages, for the delay, by the discretion of the justices before whom the writ of error is.

Cro. [illegible] 665.

This

This ſtatute is conſtrued not to extend to a writ of error out of *Ireland*, becauſe *Ireland* is not mentioned by name, nor to executors or adminiſtrators, becauſe they are not bound by the judgment, but the aſſets; and being *in auter droit* they are not preſumed to bring the writ of error for delay. 2 Danv. 227.

* There are no coſts by this act, where execution is executed, becauſe it is in delay of execution. * Page 275. 1 Ven. 88. 1 Lev. 146.

Nor coſts on a writ of error in *formedon*, becauſe the plaintiff had no coſts on the firſt judgment, and the intent of the ſtatute is conſtrued to prevent the delay of the execution for the firſt damages and coſts. Raym. 134.

There are no coſts in a writ of error in ejectment, where the damages and coſts in the firſt are levied for the ſame reaſon. 1 Vent. 88.

In a *quare impedit* there are coſts and damages given, becauſe there are damages given, though not coſts in the firſt judgment; and being in delay of execution for the damages, the court have thought it a point of diſcretion to give damages for the value of the time delayed; and the ſtatute likewiſe authoriſes them to give coſts, where they think it reaſonable to give damages, becauſe they cannot recover the meſne profits in the action of treſpaſs.

So in *aſſumpſit* they give damages from the time of bringing the writ of error.

It extends to a writ of error by a ſubſequent ſtatute; this ſtatute not extending to where a judgment was given for the defendant, and error brought by the plaintiff; this was remedied by 8 & 9 *W.* 3. *cap.* 10. which likewiſe gives a *capias ad ſatisfaciend'* for the coſts.

But more effectually to prevent defendants from bringing frivolous writs of error, by 13 *Car.* 2 *ſtat. c.* 2. *par.* 2. gives double coſts on a * Page 276.

writ

writ of error for reverſal of any judgment after verdict in the courts of *Weſtminſter*, Counties Palatine, or *Grand Seſſions of Wales*; but by the ſtatute of *William* gives only ſingle coſts to the defendants in error, when the former judgment is affirmed; for this ſhall not be preſumed merely for delay, ſince the firſt judgment was obtained againſt the plaintiff, and he keeps poſſeſſion of nothing by his writ of error.

THE

TABLE.

Abatement.

But

But

Vide Plea. Puis Darrein Continuance.

Abridgment of Action.

Action.

Addition.

Admeaſurement of Paſture.

Adminiſtrator. Vide Executor.

Alienage.

Amendment.

Amercement.

Antient Demeſne.

Appeal.

Appearance.

Appearance.

Arreſt of Judgment. Vide Judgment.

Aſſault and Battery.

Aſſignment of Bail-Bond. Vide Bail-Bond.

Aſſiſe.

Attachment.

Attainder.

Attaint.

Attorney.

Vide Privilege.

Audita Querela.

Averment.

Bail.

Bail-Bond.

Bailiffs.

Bar. Vide Plea.

Baron and Feme.

Bill.

Biſhop.

Cape.

Capias ad Reſpondendum.

Capias ad Satisfaciendum.

Capias Utlagatum. Vide Outlawry.

Challenge.

Conuzance.

Conuzance. Vide Court.

Copyholder

Corporation.

Coſts.

Covenant.

County Palatine. Vide Court.

Court. Vide the Conſtitution of England in the Introduction.

Common

Curſitor.

Cuſtom.

Cuſtos Brevium.

Damages.

Darreign

Darreign Preſentment.

Day.

Debt.

Declaration.

Declaration. Vide Pleadings.

Deed.

Default.

Defence.

Demiſe of the King. Vide Abatement.

Demurrer.

Departure.

Want

Eſcape.

Eſſoin.

Evidence.

Excommunication.

Excommunication.

Executor.

Exigent. Vide Outlawry.

False-Judgment.

Feud.

Fines.

Franchise.

Gist.

Guardian.

Habeas Corpus.

Habeas Corpora Juratorum. Vide Jury Proceſs.

Heir.

Hundred. Vide Franchiſe.

Hundredors.

Jeofail. Vide Amendment.

Imparlance.

Impriſonment.

Indictments.

Infant.

Information.

Inquiſition.

Joinder in Action.

Iſſue.

Jurisdiction. Vide Franchise and Court, Jury.

Jury Proceſs.

King Vide Prerogative.

Demiſe of the King. Vide Abatement.

King's Bench. Vide Court.

Libel.

Liberty.

Liberty.

Limitation.

Memorandums.

Miſnomer.

Niſi Prius.

Nonage. Vide Infant.

Non Omittas.

Non=

Non-Pros.

Nonsuit.

Non-Tenure. Vide Abatement.

Officers of Courts. Vide Privilege.

Original Writ. Vide Writ.

Oyer.

Paper Book.

Parol Demur. Vide Infant.

Partition.

Peer. Vide Trial.

Philazer.

Plaint.

Plea and Pleading.

But

Defendant

Plea Puis darrein Continuance.

Pledges.

Popiſh Recuſancy.

Poſſe Comitatus. 23-4

Poſtea, 138. Vide Niſi-prius.

Præmunire.

Pero-

Perogative.

Preſcription.

Privilege.

Procedendo. 246

Prohibition.

Prothonotary.

Proviſo.

Proviſo.

Quare Impedit.

Queen.

Record.

Recuſancy. Vide Popiſh Recuſancy.

Rejoinder. Vide Pleading.

Releaſe.

Remainder.

Remainder.

Repleader. 171

Replication. Vide Pleading.

Repugnancy.

Reſcue.

Rolls.

Scandalum Magnatum.

Scire Facias.

Sheriff.

Summons and Severance.

Superſedeas.

Surpluſage. Vide Repugnancy.

Trover.

Venire. Vide Jury Process.

Venue.

Verdict.

Warrant of Attorney.

Waſte.

Waſte.

Witneſs.

Writ.

FINIS.